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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

JANUARY, 1902 TO MARCH, 1903

R. M. CAROTHERS
REPORTER

VOLUME 11

GRAND FORKS, N. D.:
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Rec. Jan. 21, 1904.

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. ALFRED WALLIN, Chief Justice.[1]

HON. N. C. YOUNG, Chief Justice.

HON. D. E. MORGAN, and

HON. JOHN M. COCHRANE,[2] Judges.

R. D. HOSKINS, Clerk.

R. M. CAROTHERS, Reporter.[3]

1. Term expired December 31, 1902.
2. Qualified December 31, 1902.
3. After January 1, 1903.

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Section 101. When a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefore shall be concisely stated in writing, signed by the judges concurring, filed in the office of the clerk of the Supreme Court and preserved with a record of the case. Any judge dissenting therefrom, may give the reasons of his dissent in writing over his signature.

Section 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

LOUIS FREEMAN, *et al. vs.* W. B. WOOD.

Assignment for Creditors—Discharge of Assignee—Laches.

On September 27, 1893, plaintiffs Louis Freeman and Julius H. Burwell were copartners, and engaged in business at the city of Grand Forks, N. D., under the firm name of L. Freeman & Co., and on said day said firm, being then insolvent, made an assignment under § 4660, Comp. Laws 1887, of all the property of said firm, to the defendant, in trust for the benefit of the creditors of said firm. Defendant accepted said trust, and took all of said property into his possession as such assignee, and then and there entered upon the execution of his trust. Later, and in the month of July, 1895, an accounting was had by the defendant with respect to such trust before the district court for Grand Forks county, and such proceedings were had at such accounting that a decree or order was entered by the court in said assignment proceeding discharging the defendant and his bondsmen from further liability on account of said assignment and trust. This action was instituted in July, 1900, and was brought to compel the defendant to account anew for said trust property, and as a preliminary to such relief plaintiffs ask that the decree of discharge entered by the court in July, 1895, be vacated of record. The complaint charges, in effect, that the defendant converted a large part of the trust property to his own use, and never accounted for the same; and that the court was deceived by a false and fraudulent account presented by defendant at said accounting; and that said order of discharge was procured by fraud. The complaint further charges that the plaintiffs were induced, by the fraudulent representations made to them by the defendant, to not attend in court at the time said accounting was made, and on account of such false and fraudulent representation the plaintiffs were not present at such accounting. The complaint omits to state when the frauds complained of were first discovered by the plaintiffs, and no facts are alleged attempting to explain or excuse the laches of the plaintiffs involved in their failure to seek their remedy by means of a motion made in the assignment proceedings. A demurrer to the complaint for insufficiency was overruled by the district court. *Held*, that the ruling was error.

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Action to Set Aside Discharge—Complaint Insufficient.

The statute having provided a speedy remedy by motion, whereby a judgment obtained by fraud may be set aside, it is seldom that an independent action is necessary for this purpose, and when such actions are brought the rule is well settled that the plaintiff must allege facts excusing his failure to proceed by motion in the action. In this case no such facts are pleaded, and accordingly it is *held* that the complaint fails to state facts sufficient to constitute a cause of action.

Remedy Against Void Judgment.

In judgments which are void for want of jurisdiction the remedy either by motion or by action is available to the suitor. In such cases the statutory time limit of one year is no bar to the remedy.

Appeal from District Court, Grand Forks County; *Cowan*, J.

Action by Louis Freeman and others against W. B. Wood. Judgment for plaintiffs, and defendant appeals. Reversed.

John A. Sorley and *Geo. A. Bangs*, for appellant.

The plaintiff has mistaken his remedy. He should have moved to set aside the judgment or order of which he complains. Section 5298, Rev. Codes. Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, a court of equity will not stay proceedings at law. 3 Pom. Eq. Jur. § 1361; *Bateman* v. *Willowe*, 1 S. & R. 201; *Headley* v. *Bell*, 84 Ala. 346; *Harding* v. *Hawkins*, 141 Ill. 572, 31 N. E. Rep. 307, 33 Am. St. Rep. 347; *Ratliff* v. *Stretch*, 130 Ind. 282, 30 N. E. Rep. 30; *Whitaker* v. *Wickersham*, 5 Del. Ch. 187; *Luinger* v. *Glenn*, 33 Neb. 187, 49 N. W. Rep. 1128; *Procter* v. *Pettit*, 25 Neb. 96, 41 N. W. Rep. 131; *Phillips* v. *Pullen*, 45 N. J. Eq. 5, 15 Atl. Rep. 9. Where the judgment may be set aside by a motion in the original action upon the grounds which would give jurisdiction to a court of equity, and the time within which such motion can be made has not expired, the remedy at law is adequate and a court of equity will refuse to take jurisdiction. Freeman, Judg. § 497; *Logan* v. *Hillegas*, 16 Cal. 21; *Bibend* v. *Krentz*, 20 Cal. 109; *Lauches* v. *Carriaga*, 31 Cal. 171; *Luco* v. *Brown*, 73 Cal. 3, 14 Pac. Rep. 366; *Hollinger* v. *Reeme*, 138 Ind. 363, 46 Am. St. Rep. 402; *Whitehurst* v. *Transportation Co.*, 13 S. E. Rep. 937; *Crocker* v. *Allen*, 13 S. E. Rep. 650, 27 Am. St. Rep. 831; *Dupratt* v. *James*, 61 Cal. 360; *Ketchum* v. *Crippen*, 37 Cal. 223; *Heller* v. *Mfg. Co.*, 47 Pac. Rep. 1016; *Yorke* v. *Yorke*, 3 N. D. 343; *Kitzman* v. *Mfg. Co.*, 10 N. D. 26, 84 N. W. Rep. 585; *Crandell* v. *Bacon*, 20 Wis. 639; 91 Am. Dec. 451; *Buckley* v. *Hellbrunner*, 7 Ind. 489; *Grass* v. *Hess*, 37 Ind. 193; *March* v. *Best*, 41 Mo. 493; *Vilas* v. *Ry. Co.*, 23 N. E. Rep. 941. The complaint fails to show diligence on the part of the plaintiffs, either before or after judgment. A court of equity will therefore refuse to take jurisdiction. Freeman, Judg., § § 506, 493, 486; *Burton* v. *Wiley*, 26 Vt. 432; Story's Eq. Jur. 1574; *Emerson* v. *Nuall*, 13 Vt. 477; *Pettes* v. *Bank*, 17 Vt. 435; *Carring-*

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ton v. *Holabird,* 17 Conn. 530; *S. C.,* 19 Conn. 84; *Foster* v. *Wood,* 6 Johns. Ch. 87. Where a judgment rendered is clearly inequitable and is obtained through accident, surprise, mistake, fraud, or wrongful conduct of the plaintiff, and where no relief can be obtained, except in equity, because of the persuasive character of the equities, relief is granted; but if the applicant's wilful negligence or inattention has contributed to his unfortunate position. equity will not interfere. *Champion* v. *Woods,* 76 Cal. 17, 17 Pac. Rep. 942; *Stroup* v. *Sullivan,* 46 Am. Dec. 389; *Bellamy* v. *Woodson,* 48 Am. Dec. 221; *Ames* v. *Snider,* 55 Ill. 498; *Cairo Ry. Co.* v. *Holbrook,* 92 Ill. 297; *Ratliff* v. *Stretch,* 130 Ind. 282, 30 N. E. Rep. 30; *English* v. *Aldrich,* 31 N. E. Rep. 456; *Casey* v. *Gregory,* 56 Am. Dec. 581; *Kelleher* v. *Boden,* 21 N. W. Rep. 346; *Norwegian Co.* v. *Bollman,* 66 N. W. Rep. 292; *Brenner* v. *Alexander,* 19 Pac. Rep. 9; *Tompkins* v. *Brennen,* 56 Fed. Rep. 694. The plaintiffs in this case should be required to set forth specifically the time when the fraud was discovered and the reasons for the delay in bringing this suit. *March* v. *Whitmore,* 88 U. S. 482; *Badger* v. *Badger,* 69 U. S. 836; *Campair* v. *VanDyke,* 15 Mich. 371. There has never been a rescission either by the creditors or by Jones. The creditors were the only ones who could rescind. They are the ones whose consent to the act was obtained by fraud. They alone can act, and not an assignee of their cause of action. Section 3931, Rev. Codes; 1 Bigelow on Frauds, 73, 214, 545; Bishop on Contracts, 671; *Crocker* v. *Bellangee,* 6 Wis. 645, 70 Am. Dec. 489; *M. & M. Ry. Co.* v. *Ry. Co.,* 20 Wis. 144, 88 Am. Dec. 740. Cause of action is not assignable and Jones cannot maintain this action. *Dayton* v. *Fargo,* 45 Mich. 153; *Brush* v. *Sweet,* 38 Mich. 574; *Norton* v. *Tuttle,* 50 Ill. 130; *Holmes* v. *Moore,* 5 Pick. 257; *Leggate* v. *Moulton,* 115 Mass. 552; *Murray* v. *Buell,* 76 Wis. 657, 45 N. W. Rep. 667; *Sanborn* v. *Doe,* 28 Pac. Rep. 105; *Whitney* v. *Kelley,* 29 Pac. Rep. 624. No person will be permitted to proceed against a judgment to which he was not a party and which did not at its rendition affect any of his rights. 2 Freeman, Judg. 512, 15 Enc. Pl. & Pr. 249, 250.

Tracy R. Bangs and *Cochrane & Corliss,* for respondents.

It is conceded that before the tranfer to Jones of their rights, the creditors of Freeman & Co. had a right to call upon defendant to account and to escape the force of the order discharging him as assignee, by showing the fraud alleged. The transfer by the creditors of their rights to Jones in no manner operated to prejudice the defendant, and he was not thereby released from all liability for wholesale fraud and abuse of trust. *Graham* v. *Ry. Co.,* 102 U. S. 148; *Dickinson* v. *Burrell, L. R.,* 1 Eq. Cas. 337; *McMahon* v. *Allen,* 35 N. Y. 403; *Cockell* v. *Taylor,* 15 Beav. 103, 2 Am. & Eng. Enc. L. (2d Ed.) 1024, 1025; *Whitney* v. *Roberts,* 22 Ill. 381; *Norton* v. *Tuttle,* 60 Ill. 130. A mere right to complain of

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Action to Set Aside Discharge—Complaint Insufficient.

The statute having provided a speedy remedy by motion, whereby a judgment obtained by fraud may be set aside, it is seldom that an independent action is necessary for this purpose, and when such actions are brought the rule is well settled that the plaintiff must allege facts excusing his failure to proceed by motion in the action. In this case no such facts are pleaded, and accordingly it is *held* that the complaint fails to state facts sufficient to constitute a cause of action.

Remedy Against Void Judgment.

In judgments which are void for want of jurisdiction the remedy either by motion or by action is available to the suitor. In such cases the statutory time limit of one year is no bar to the remedy.

Appeal from District Court, Grand Forks County; *Cowan*, J.

Action by Louis Freeman and others against W. B. Wood. Judgment for plaintiffs, and defendant appeals. Reversed.

John A. Sorley and *Geo. A. Bangs*, for appellant.

The plaintiff has mistaken his remedy. He should have moved to set aside the judgment or order of which he complains. Section 5298, Rev. Codes. Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, a court of equity will not stay proceedings at law. 3 Pom. Eq. Jur. § 1361; *Bateman* v. *Willowe*, 1 S. & R. 201; *Headley* v. *Bell*, 84 Ala. 346; *Harding* v. *Hawkins*, 141 Ill. 572, 31 N. E. Rep. 307, 33 Am. St. Rep. 347; *Ratliff* v. *Stretch*, 130 Ind. 282, 30 N. E. Rep. 30; *Whitaker* v. *Wickersham*, 5 Del. Ch. 187; *Luinger* v. *Glenn*, 33 Neb. 187, 49 N. W. Rep. 1128; *Procter* v. *Pettit*, 25 Neb. 96, 41 N. W. Rep. 131; *Phillips* v. *Pullen*, 45 N. J. Eq. 5, 15 Atl. Rep. 9. Where the judgment may be set aside by a motion in the original action upon the grounds which would give jurisdiction to a court of equity, and the time within which such motion can be made has not expired, the remedy at law is adequate and a court of equity will refuse to take jurisdiction. Freeman, Judg. § 497; *Logan* v. *Hillegas*, 16 Cal. 21; *Bibend* v. *Krentz*, 20 Cal. 109; *Lauches* v. *Carriaga*, 31 Cal. 171; *Luco* v. *Brown*, 73 Cal. 3, 14 Pac. Rep. 366; *Hollinger* v. *Reeme*, 138 Ind. 363, 46 Am. St. Rep. 402; *Whitehurst* v. *Transportation Co.*, 13 S. E. Rep. 937; *Crocker* v. *Allen*, 13 S. E. Rep. 650, 27 Am. St. Rep. 831; *Dupratt* v. *James*, 61 Cal. 360; *Ketchum* v. *Crippen*, 37 Cal. 223; *Heller* v. *Mfg. Co.*, 47 Pac. Rep. 1016; *Yorke* v. *Yorke*, 3 N. D. 343; *Kitzman* v. *Mfg. Co.*, 10 N. D. 26, 84 N. W. Rep. 585; *Crandell* v. *Bacon*, 20 Wis. 639; 91 Am. Dec. 451; *Buckley* v. *Hellbrunner*, 7 Ind. 489; *Grass* v. *Hess*, 37 Ind. 193; *March* v. *Best*, 41 Mo. 493; *Vilas* v. *Ry. Co.*, 23 N. E. Rep. 941. The complaint fails to show diligence on the part of the plaintiffs, either before or after judgment. A court of equity will therefore refuse to take jurisdiction. Freeman, Judg., § § 506, 493, 486; *Burton* v. *Wiley*, 26 Vt. 432; Story's Eq. Jur. 1574; *Emerson* v. *Nuall*, 13 Vt. 477; *Pettes* v. *Bank*, 17 Vt. 435; *Carring-*

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ton v. *Holabird,* 17 Conn. 530; *S. C.,* 19 Conn. 84; *Foster* v. *Wood,* 6 Johns. Ch. 87. Where a judgment rendered is clearly inequitable and is obtained through accident, surprise, mistake, fraud, or wrongful conduct of the plaintiff, and where no relief can be obtained, except in equity, because of the persuasive character of the equities, relief is granted; but if the applicant's wilful negligence or inattention has contributed to his unfortunate position. equity will not interfere. *Champion* v. *Woods,* 76 Cal. 17, 17 Pac. Rep. 942; *Stroup* v. *Sullivan,* 46 Am. Dec. 389; *Bellamy* v. *Woodson,* 48 Am. Dec. 221; *Ames* v. *Snider,* 55 Ill. 498; *Cairo Ry. Co.* v. *Holbrook,* 92 Ill. 297; *Ratliff* v. *Stretch,* 130 Ind. 282, 30 N. E. Rep. 30; *English* v. *Aldrich,* 31 N. E. Rep. 456; *Casey* v. *Gregory,* 56 Am. Dec. 581; *Kelleher* v. *Boden,* 21 N. W. Rep. 346; *Norwegian Co.* v. *Bollman,* 66 N. W. Rep. 292; *Brenner* v. *Alexander,* 19 Pac. Rep. 9; *Tompkins* v. *Brennen,* 56 Fed. Rep. 694. The plaintiffs in this case should be required to set forth specifically the time when the fraud was discovered and the reasons for the delay in bringing this suit. *March* v. *Whitmore,* 88 U. S. 482; *Badger* v. *Badger,* 69 U. S. 836; *Campair* v. *VanDyke,* 15 Mich. 371. There has never been a rescission either by the creditors or by Jones. The creditors were the only ones who could rescind. They are the ones whose consent to the act was obtained by fraud. They alone can act, and not an assignee of their cause of action. Section 3931, Rev. Codes; 1 Bigelow on Frauds, 73, 214, 545; Bishop on Contracts, 671; *Crocker* v. *Bellangee,* 6 Wis. 645, 70 Am. Dec. 489; *M. & M. Ry. Co.* v. *Ry. Co.,* 20 Wis. 144, 88 Am. Dec. 740. Cause of action is not assignable and Jones cannot maintain this action. *Dayton* v. *Fargo,* 45 Mich. 153; *Brush* v. *Sweet,* 38 Mich. 574; *Norton* v. *Tuttle,* 50 Ill. 130; *Holmes* v. *Moore,* 5 Pick. 257; *Leggate* v. *Moulton,* 115 Mass. 552; *Murray* v. *Buell,* 76 Wis. 657, 45 N. W. Rep. 667; *Sanborn* v. *Doe,* 28 Pac. Rep. 105; *Whitney* v. *Kelley,* 29 Pac. Rep. 624. No person will be permitted to proceed against a judgment to which he was not a party and which did not at its rendition affect any of his rights. 2 Freeman, Judg. 512, 15 Enc. Pl. & Pr. 249, 250.

Tracy R. Bangs and *Cochrane & Corliss,* for respondents.

It is conceded that before the tranfer to Jones of their rights, the creditors of Freeman & Co. had a right to call upon defendant to account and to escape the force of the order discharging him as assignee, by showing the fraud alleged. The transfer by the creditors of their rights to Jones in no manner operated to prejudice the defendant, and he was not thereby released from all liability for wholesale fraud and abuse of trust. *Graham* v. *Ry. Co.,* 102 U. S. 148; *Dickinson* v. *Burrell, L. R.,* 1 Eq. Cas. 337; *McMahon* v. *Allen,* 35 N. Y. 403; *Cockell* v. *Taylor,* 15 Beav. 103, 2 Am. & Eng. Enc. L. (2d Ed.) 1024, 1025; *Whitney* v. *Roberts,* 22 Ill. 381; *Norton* v. *Tuttle,* 60 Ill. 130. A mere right to complain of

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fraud is not assignable, fraud not being a vendible commodity. I Parson, Contracts, 226; Story ,Eq. Jur. § 1040; *Cross* v. *Bank,* 66 Cal. 462, 6 Pac. Rep. 94; *Whitney* v. *Kelley,* 29 Pac. Rep. 624; *Crocker* v. *Bellangee,* 70 Am. Dec. 489. But the rule applies only to a case where the assignment does not carry anything which has itself a legal existence and value independent of the right to sue for fraud. The assignee of a creditor may maintain an action to set aside a fraudulent transfer made by the debtor before the claim was assigned to such assignee. 2 Bigelow on Fraud, 423; *Billingsly* v. *Clelland,* 23 S. E. Rep. 820; Waite's Fraud, Conv. 392; *Warren* v. *Williams,* 52 Me. 349; *Lionberger* v. *Baker,* 14 Mo. App. 353; Bump's Fraud. Conv. 506; *Schlieman* v. *Bowlin,* 36 Minn. 199. Fraud being charged against the defendant, if he allege laches in the plaintiff, it is for him to show when the plaintiff acquired knowledge of the truth, and that plaintiff knowingly forebore to assert his rights. 12 Am. & Eng. Enc. L. 603. The statute gives six years after discovery of fraud in which to sue: Section 5201, Subd. 6, Rev. Codes. Where a cause of action arises from fraud the statute of limitation will not begin to run, nor laches apply, until the discovery of the fraud. The failure to use diligence is excused where there is a relation of trust and confidence, rendering it the duty of the party committing the fraud to disclose the truth to the other. *Farwell* v. *Telegraph Co.,* 44 N. E. Rep. 891; *Penn* v. *Fogler,* 55 N. E. Rep. 192; *Kelly* v. *Boettcher,* 85 Fed. Rep. 55; *Williams* v. *Monroe,* 101 Fed. Rep. 329; 18 Am. & Eng. Enc. L. (2d Ed.) 97, 105; *Beaumont* v. *Boultbee,* 5 Ves. 485; *Boswell* v. *Coaks,* L. R. 27 Ch. Div. 424, 457. In an action by a creditor to compel an accounting by the assignee and recover his share of the trust fund, such creditor can sue in his own behalf and in behalf of others who may choose to come in under the decree. *Travis* v. *Myers,* 67 N. Y. 542; Burrill on Assignments, § 443; Story's Eq. Pl. § 191; *Piatt* v. *Oliver,* 19 Fed. Cas. 563; § 5232, Rev. Codes. A final account and settlement may be set aside in equity for fraud in withholding property from the settlement. *Griffith* v. *Godley,* 113 U. S. 89, 5 Sup. Ct. Rep. 385; *Williams* v. *Herrick,* 25 Atl. Rep. 1100; *Pratt* v. *Northam,* 19 Fed. Cas. 1254; *Adair* v. *Cummin,* 48 Mich. 375; *Holden* v. *Meadows,* 31 Wis. 284; *McLachlan* v. *Staples,* 13 Wis. 448; *Pugh* v. *Hastings,* 1 Barb. Ch. 452; *Anderson* v. *Anderson,* 52 N. E. Rep. 1038; 2 Leading Cases in Eq. 208, and note; *Bruce* v. *Doolittle,* 81 Ill. 103; 1 Woerner Admin. 1132, and note; *West* v. *Waddill,* 33 Ark. 575, 584; *Clark* v. *Shelton,* 16 Ark. 475; *Penn* v. *Penn,* 39 Mo. App. 282; *Byerly* v. *Donlin,* 72 Mo. 270; *Houts* v. *Shepperd,* 79 N. W. Rep. 141; *Miller* v. *Steele,* 64 Ind. 79; *Ridenbaugh* v. *Burns,* 14 Fed. Rep. 93; *Greene* v. *Sargent,* 23 Vt. 466, 11 Am. & Eng. Enc. L. (2d Ed.) 1315, 1316.

WALLIN, C. J. In this action defendant has appealed to this court from an order of the district court overruling a demurrer to the complaint. The grounds of the demurrer, among others, are

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that the complaint does not state facts sufficient to constitute a cause of action. The object of the action is to compel the defendant, as assignee, to account for a trust estate, and incidentally to such relief the plaintiffs ask that a certain order or decree of the district court, hereinafter referred to, be annulled, and vacated of record. The controlling facts alleged in the complaint may be briefly stated as follows: That the firm of L. Freeman & Co. (consisting of Louis Freeman and Julius H. Burwell), on the 27th day of September, 1893, and prior thereto, was and had been engaged in the farm machinery business at the city of Grand Forks, in this state, and on said date said firm was insolvent in the sense that it was unable to meet its liabilities as they matured; that on account of said insolvency said firm made a formal and written assignment of all its property to the defendant, in trust for the benefit of the creditors of said firm; that said assignment was made and perfected under and pursuant to the statute (Comp. Laws 1887, § 4660) regulating assignments made for the benefit of creditors; that the defendant accepted said assignment and trusteeship, and, after giving a bond as required by the statute, and in the sum of $80,000, the defendant took into his possession and control all the property so assigned to him; that the property so assigned and delivered to the defendant consisted of merchandise, book accounts, bills receivable, notes, and mortgages; that in the month of July, 1895, the defendant presented his report and final account as such assignee to the district court for Grand Forks county, whereupon such proceedings were had that said district court approved of said final account, and entered an order discharging the defendant and his bondsmen from further liability on account of said assignment and said trust property. The complaint further states that the defendant was corrupt and unfaithful in the administration of said trust, and that while acting as such assignee the defendant was guilty of divers acts of a grossly corrupt and fraudulent nature, and concerning which acts the complaint is full and explicit in setting out the details. But, in the view which this court has taken of this case, it becomes unnecessary to enlarge upon this feature of the complaint further than to state in general terms that the complaint charges that the defendant wholly failed to account for a large portion of said trust property; that he fraudulently converted a large part of the property to his own use, and especially that in the month of May, 1895, and while defendant had in his possession property belonging to the trust fund of the value of over $30,000, he falsely stated and represented to the creditors of the assignee that the property remaining in his hands consisted of certain assets of the face value of only $13,000, and that such assets were much depreciated in value, and difficult to collect, if collectible at all, and that upon said false representation of the value of the assets on hand and undistributed the creditors, upon the defendant's advice so to do (which advice was fraudu-

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lently given), consented to a sale of such assets at private sale, whereupon the defendant made a pretended sale of some of the trust property at private sale, but that such sale so made was in all respects a fraudulent sale, and the defendant was the real purchaser at such fraudulent sale. It is further alleged that the defendant falsely represented to creditors that he had distributed the proceeds of the trust estate among the creditors, except an amount lawfully deducted therefrom by the defendant as and for expenses incident to the trust; that the creditors fully believed and relied upon the false and fraudulent misrepresentations of the defendant as to his administration of said trust, and, so believing, were wholly deceived and misled thereby, and on account thereof the plaintiffs and their predecessors in interest did not appear at said accounting made by the defendant in the district court, and remained away from court at said accounting; and that said court was deceived and misled by such false report and false accounting. It further appears by the complaint that the plaintiff Andy Jones, at some date not stated, purchased certain indebtedness and claims against said assignee, which were in existence when the assignment was made, and that pursuant to such purchases said claims were assigned to said Andy Jones prior to the commencement of this action. It also appears that certain other creditors of the assignee still hold claims against the assignee, which have not been assigned to said Jones, but are still owned by such creditors. This action is brought by the individual members of said insolvent firm and by Andy Jones, and also brought for the benefit of any creditor of the said assignors who may come in and contribute to the expense of the prosecution.

The facts as above set out, and which are conceded by the demurrer, will suffice to present the questions of law which, in the opinion of this court, are decisive of the case. As has been seen, the ultimate relief prayed for by the plaintiffs is to compel the defendant to account as trustee under said assignment. But it appears that the defendant has previously accounted as such trustee in said proceeding, and upon such accounting a competent court, sitting in equity, has entered its final decree discharging the defendant and his bondsmen. It is, of course, needless to say that the prior decree of discharge is, as long as it exists, an insurmountable barrier in the way of any other or further accounting in the same matter; and plaintiffs, recognizing the fact that the former decree is an obstacle in their way, have asked, as a necessary preliminary to the other relief sought, that said former decree of discharge be annulled and set aside by a decree in this action. It therefore appears that this action is brought to vacate a judgment entered in the same court upon the same subject-matter and between the same parties or their privies. The former judgment was entered in July, 1895, and this action was commenced five years thereafter. The plaintiffs neither allege nor claim that

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the asignors and their creditors did not receive notice of the accounting had before the court in July, 1895; on the contrary, the complaint is drawn upon the theory that plaintiffs or their predecessors in interest were one and all regularly cited to appear at such accounting. But the plaintiffs, by proper averments of fact, do show that the accounting was false and fraudulent, and that the court was deceived and hoodwinked by the false account of the defendant, and that, if the court had not been so deceived, it would not have entered its decree discharging defendant and his bondsmen. But the greatest stress is laid by counsel for the respondents upon the fact that the complaint sets out certain facts showing that the creditors especially were deceived to their prejudice by defendant, in this: that the defendant falsely represented to the creditors, immediately prior to the date of said accounting, that the trust property had, prior to the accounting, been all disposed of by him, and that the net proceeds, less the expenses incident to the trust, had been divided pro rata among the creditors of said insolvent firm. Upon this representation it is alleged, in substance, that the creditors deemed it unnecessary and useless to attend court, and hence they remained away, and did not appear at the accounting. These facts show that the plaintiffs in this action are seeking to impeach a former decree of the district court upon the ground of fraud, and that the fraud complained of is of a twofold nature, in this: that it deceived the court which entered the judgment, and likewise so operated that it induced the plaintiffs and their privies not to appear in court at the hearing of defendant's final account. With respect to judgments procured by frauds of this character it goes without saying that the courts will, and always have, upon proper application, set aside the same. Under the old procedure judgments procured by such frauds as appear in this case could be vacated, or their enforcement enjoined, by a suit instituted in a court of equity. See *Kitzman* v. *Manufacturing Co.*, 10 N. D. 26, 84 N. W. Rep. 585. But in that case this court said: "But it is further true that under the code procedure certain statutory provisions, such as that embraced in section 5288, have afforded a remedy by motion as a means of relief against judgments which, prior to the adoption of their code, was obtainable only in courts of equity. As a result of these innovations upon the ancient procedure, it has seldom been found necessary in the code states for a suitor to enjoin the enforcement at law by means of an independent action for equitable relief." This remedy by motion is available in equity cases as well as those at law. 6 Enc. Pl. & Prac. 151. In the Kitzman Case a demurrer to the complaint was sustained upon the express ground that the remedy by motion was available to the plaintiff in that action, and we there held that an independent action would not lie where the remedy by motion is available to the suitor. We think the ruling in that case rests upon sound reason, as well as upon good authority, and hence the rule

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should be adhered to in the interest of an orderly and uniform practice. See *Johnston* v. *Paul,* 23 Minn. 46; also, *Weilan* v. *Shillock,* Id. 227. It seems that in Wisconsin the relief such as is sought here can be obtained only by motion. *Stein* v. *Benedict,* 83 Wis. 603, 53 N. W. Rep. 891; *Pier* v. *Millerd,* 63 Wis. 33, 22 N. W. Rep. 759. But in California the cases hold that, where it appears that without plaintiff's fault the remedy by motion is not available, an independent action will lie. See *Sugar Co.* v. *Porter,* 68 Cal. 369, 9 Pac. Rep. 313; *Lapham* v. *Campbell,* 61 Cal. 296; *Baker* v. *O'Riordan,* 65 Cal. 368, 4 Pac. Rep. 232. But the rule is well settled and inflexible that, where an action is brought in a court of equity to enjoin or vacate a judgment, facts must be alleged excusing the failure to resort to all remedies available in the original action (11 Enc. Pl. & Prac. 1193); and in such cases the plaintiff must plead facts in excuse of his laches and tending to show that he has acted promptly after discovering the fraud. *Hollinger* v. *Reeme,* 138 Ind. 363, 36 N. E. Rep. 1114, 24 L. R. A. 46, 46 Am. St. Rep. 402; *Renfroe* v. *Renfroe,* 54 Mo. App. 429; *George* v. *Tuft,* 36 Mo. 141. In Iowa, under a statute which permitted a court to vacate a judgment obtained by fraud within one year after its rendition, it is held that, if the injured party was prevented by fraud from moving within the year, a court of equity would permit him to institute an action for relief after the year. See *Lumpkin* v. *Snook,* 63 Iowa, 515, 19 N. W. Rep. 333. But in such cases sufficient reasons for the delay by the party must be pleaded asking for relief in a court of equity. See *District Tp.* v. *White,* 42 Iowa, 608. The statutory remedy by motion is, however, not the only mode of assailing a judgment. In cases not embraced within the statute resort may be had to a court of equity. See *Smithson* v. *Smithson,* 37 Neb. 535, 56 N. W. Rep. 300, 40 Am. St. Rep. 504. So it has been held that equity will take juridiction to annul a void judgment, even where a motion would lie for the same purpose Void judgments are not strictly within the statute On this point, see *Dobbins* v. *McNamara,* 113 Ind. 54, 14 N. E. Rep. 887, 3 Am. St. Rep. 626; *Heffner* v. *Gunz,* 29 Minn. 109, 12 N. W. Rep. 342; *Magin* v. *Lamb,* 43 Minn. 80, 44 N. W. Rep. 675, 19 Am. St. Rep. 216; also, *Yorke* v. *Yorke,* 3 N. D. 343, 55 N. W. Rep. 1095. But we think the case at bar squarely falls within the principle of the *Kitzman case,* supra. In that case the plaintiff brought an independent action to vacate a judgment of the district court obtained by fraud, and this court sustained a demurrer to the complaint. That case was quite similar to this with respect to the nature of the fraud charged in procuring the judgment, and also as to the very great length of time which elapsed after the entry of the fraudulent judgment and before suit was brought to vacate the same. In that case the demurrer was sustained, not because fraud in procuring the judgment was not shown, but was sustained upon the sole ground that the plaintiff omitted to set out facts explain-

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ing and excusing his failure to seek his remedy by motion made in the original action. The complaint in the case at bar is obnoxious to precisely the same objection. The plaintiffs in this case have neither alleged nor attempted to allege any facts or circumstances by way of excuse for their failure to apply by motion in the assignment proceeding to vacate the judgment of discharge which they are now seeking to vacate by an independent action. The discharge of the defendant and his bondsmen was clearly in the nature of a final decree or judgment in an equitable proceeding; but, whether the same should be regarded as a judgment, or as merely an "order or other proceeding," it is alike assailable by motion in the insolvent proceeding. See Comp. Laws, § 4939. Under a familar rule of pleading it is the duty of this court to construe this complaint most strictly against the pleader, and the reason of this rule is that it is presumed that any fact favorable to the pleader, within his knowledge, will be set out in the pleading. Applying this rule, we are bound to assume for the purposes of the demurrer that the plaintiffs had knowledge of the very acts of fraud of which they now complain at a date prior to the expiration of the statutory limit of one year within which a motion to vacate the judgment could have been made. No time is stated in the complaint at which the plaintiffs, or any of them, discovered the fraud of which they are complaining, and hence we must assume for the purposes of the case on this appeal that such discovery was made in fact within a year after the judgment complained of was entered. But we must not be understood as ruling or suggesting that under no circumstances can the remedy by motion be had after the time limit fixed by the statute has elapsed. Such is not our view of the statute, and this court has distinctly held, under certain conditions, that the remedy by motion is not limited to one year after the judgment or order has been entered. See *Manufacturing Co.* v. *Holz*, 10 N. D. 16, 84 N. W. Rep. 581. In the case cited the remedy by motion in the action was sought seven years after the entry of the judgment, but within one year after notice of such entry, and it was ruled that the motion was not barred by lapse of time. It has been seen that the courts of California have been very liberal in construing the statutory remedy, and have permitted actions to be brought for the relief provided by the statute; but in all such cases the plaintiff has alleged facts in excuse of his laches in not proceeding by motion under the statute. In the case at bar, upon the facts set out, the plaintiffs had ample reason for their nonappearance before the district court when they were cited to appear at the final hearing of the defendant's account in July, 1895, and that reason would have excused their default and their nonappearance at such hearing. Their neglect was clearly excusable, and hence the case was one strictly within the statute, and in which the court could have afforded equitable remedies by motion.

Our conclusion is that the order overruling the demurrer must be

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reversed, and the case remanded for further proceedings. All the judges concurring.

(88 N. W. Rep. 721.)

JOHN DRINKALL *vs.* MOVIUS STATE BANK.

Cashier's Check Not Open to Countermand.

A cashier's check, being merely a bill of exchange drawn by a bank upon itself, and accepted in advance by the act of its issuance, is not subject to countermand, like an ordinary check, and the relations of the parties to such an instrument are analogous to those of the parties to a negotiable promissory note payable on demand.

Indorsement—Illegal Consideration.

Both under elementary principles of the law of contracts and by the provisions of § 59 of chapter 100 of the Civil Code (Rev. Codes 1899), the title of an endorser of a negotiable note is defective when the consideration for the indorsement is unlawful, or where the indorsement is procured by unlawful means.

Payment in Good Faith a Discharge.

Payment of a negotiable instrument, to effect a discharge, must be made to the rightful holder or his authorized agent; but the mere possession of such an instrument indorsed by the payee in blank is prima facie evidence of the holder's right to demand and receive payment, and payment to such holder will discharge the instrument, when made in good faith, and in ignorance of facts which impair the holder's title.

Gambling—Illegal Consideration.

Under the statutes of this state gambling is expressly prohibited. It is accordingly *held*, that the indorsement and delivery of a cashier's check by the payee to a gambler in payment for chips to be used in a gambling game does not make such gambler a holder in due course, and his title so acquired is defective.

Recovery by Indorsee.

The rule that courts of law and equity will leave the parties to prohibited transactions where their unlawful acts have placed them, so far as the same are executed, does not authorize an indorsee, who has procured the indorsement of a negotiable instrument in a gambling transaction, to rely upon the indorsement so procured, either against the indorser or the maker of the instrument. Neither will prevent the payee of the instrument which has been so indorsed from enforcing payment against the maker, for the obvious reason that the contract which the latter enforces is not tainted with the unlawful transaction.

Verdict Sustained by the Evidence.

The plaintiff in this action seeks to recover on a cashier's check issued to him by the defendant, which check he indorsed and delivered to a gambler in payment for chips to be used in playing a roulette wheel. The check was thereafter paid to the gambler by the

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defendant. We find there is substantial evidence in the record to sustain the finding of the jury that the defendant had notice of the defect in the gambler's title prior to making such payment, and therefore hold that it was not error for the trial court to overrule defendant's motion for a new trial, based upon the insufficiency of the evidence as to notice. Wallin, C. J., concurring.

Appeal from District Court, Richland County; *Lauder,* J.

Action by John Drinkall against the Movious State Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Purcell & Bradley, for appellant.

Appellant indorsed his cashier's check and delivered it in return for poker chips used in a gambling game and when he was intoxicated. He was at the bank when it was presented for payment and advised the cashier not to pay the same. He did not deny his indorsement and gave no reason to the cashier why it should not be paid. There is nothing to indicate that the bank or its officers tried to avoid notice or prevented the plaintiff from making a full disclosure of his reasons for not wanting the check paid. *Watson* v. *Walker,* 23 N. H. 471; *Hatch* v. *White,* 22 Pick. 518; *Lamphere* v. *Cowan,* 42 Vt. 175. The burden was on appellant to show that Maxwell, the indorsee, was not a bona fide holder. *Pennsylvania Bank* v. *Frankish,* 91 Pa. St. 339. The cashier's check in controversy is a bill of exchange drawn by the drawer upon itself and is equivalent to an acceptance. Ch. 100, Civ. Code 1899, § 185; 1 Daniel's Neg. Inst. 444; 1 Parson's N. & B. 288; 2 Randolph's Com. Pr. 588; *Hasey* v. *Beet Sugar Co.,* 1 Douglas, 193; *Cunningham* v. *Wardwell,* 12 Me. 466. A bank issuing a cashier's check has accepted it in advance and is liable to pay it to the payee or to any person to whom the payee has transferred it by indorsement. An acceptance, when once complete, is irrevocable. Byles on Bills, 198; Chitty on Bills, 347; 1 Daniel's Neg. Inst. 452; *Anderson* v. *Bank,* 1 McCreary, 352. This check stood on the same basis as a certified check. Morse on Banking, § 399. Appellant, as the loser in a gambling transaction, when he indorsed the check to the winner in payment of his gambling debt, fully executed the gambling contract. The bank had no concern with appellant's remedy against the gambler. As between themselves the law left the parties to the gambling transaction where it found them, and respondent cannot be injured in consequence of the transfer of the check upon the illegal consideration. *Reed* v. *Bond,* 55 N. W. Rep. 619; *Kerr* v. *Birnie,* 25 Ark. 225; *Ager* v. *Duncan,* 50 Cal. 325; *Howell* v. *Fountain,* 46 Am. Dec. 415; *Morris* v. *Philpot,* 11 Ind. 447; *Nudd* v. *Burnett,* 14 Ind. 25; *Dumont* v. *Durfec,* 27 Ind. 283; *Clark* v. *Ry. Co.,* 5 Neb. 314; *Hill* v. *Freeman,* 49 Am. Rep. 48; *Leveroos* v. *Reis,* 52 Minn. 259. 53 N. W. Rep. 1155. The object of the rule as to executed contracts is stated in *Morris* v. *Heinrath* 101 Mass. 366. to be that either party to an illegal contract, where they are in pari delicto and the contract is executed, is not to give validity to the transaction, but to deprive

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the parties of the right to enforce the same or of relief therefrom. *Kahn* v. *Walton*, 20 N. E. Rep. 203; *Cowells* v. *Raguet*, 14 Ohio, 38; *Thorne* v. *Cronize*, 16 Ohio 54. There is no evidence that plaintiff's intoxication deprived him of the use of his reason, or that the indorsement was made through fraud, procurement, or undue advantage by the other party. Pom. Eq. Jur. 949.

Freerks & Freerks, for respondents.

The bare indorsement of the cashier's check did not operate as an assignment of the funds against which it was drawn, 2 Daniel's Neg. Inst. 1623; § 189 Rev. Codes, 1899. The consideration of a contract must be lawful. § 3873, Rev. Codes. When the contract has but a single object, and that unlawful, it is void. § 3869, Rev Codes. The contract under which this check was indorsed to plaintiff was in violation of express law. § 3920, Rev. Codes; *Dows* v. *Glaspet*, 4 N. D. 251. Courts will not render their aid to parties conspiring to impede the law, therefore an illegal consideration will not support a contract. *Congress, etc., Co.* v. *Knowlton*, 103 U. S. 350; *Widoe* v. *Webb*, 20 Oh. St. 431; *Sternberg* v. *Bowman*, 103 Mass. 325; *Tucker* v. *West*, 29 Ark. 386; *Bailey* v. *Bushing*, 28 Conn. 455; *Harwood* v. *Knapper*, 50 Mo. 456; *Porter* v. *Jones*, 52 Mo. 399. The illegal contract of wager being a nullity, the money paid thereon could be recovered before it had actually been paid into the hands of the winning party. After it had been paid over, the parties being equally in fault, the law would assist neither. *Jennings* v. *Reynolds*, 4 Kan. 110; *Reynolds* v. *McKinney*, 4 Kan. 94. The contract between the parties to the wager being void, the stakeholder became the agent or bailee of the depositor and held the money subject to his order. The authority of the bank to pay the check in this instance was revoked before payment and its right to pay the same to the indorsee, a party to the gambling transaction, was thereby terminated. *Cleveland* v. *Wolfe*, 7 Kan. 185; 2 Parsons on Contracts, 139; *Tarleton* v. *Baker*, 18 Vt. 9; *Wheeler* v. *Spencer*, 15 Conn. 28; *McAllister* v. *Hoffman*, 16 Serg. & R. 141; *Morgan* v. *Groff*, 4 Barb. 527. The verdict of the jury will not be disturbed. All doubts are to be resolved in its favor, and there is substantial evidence to sustain the verdict. *Halley* v. *Folsom*, 1 N. D. 325; *McRea* v. *Bank*, 6 N. D. 353; *Rosenbaum* v. *Hayes*, 8 N. D. 461; *Becker* v. *Duncan*, 8 N. D. 600; *Heyrock* v. *McKenzie*, 8 N. D. 601; *Taylor* v. *Jones*, 3 N. D. 235; *Clark* v. *Walker*, 7 N. D. 414.

YOUNG, J. The plaintiff in the action, John Drinkall, seeks to recover from the defendant, the Movius State Bank, a state banking corporation organized under the banking laws of this state, and doing business in the village of Lidgerwood, the sum of $200 and interest, as due and unpaid, on a certain cashier's check or certificate of deposit issued by the defendant to the plaintiff on the 18th day of December, 1899. The defense interposed is payment to the holder and owner thereof in due course of business. The case was

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tried to a jury, and a verdict returned for plaintiff for the full amount claimed. Defendant moved for a new trial. This was denied, and judgment was entered on the verdict. The defendant appealed from the judgment, and assigns for review in this court the same errors which were relied upon in the trial court in its motion for a new trial.

The complaint, in substance, alleges that on the 18th day of December, 1899, the plaintiff deposited with the defendant bank in Lidgerwood the sum of $200; that the defendant issued therefor and delivered to plaintiff its certificate of deposit or cashier's check, dated on that day, and payable to plaintiff on demand; that on the 30th day of December thereafter he duly demanded of defendant the payment of the sum of $200 represented by said certificate of deposit or cashier's check; that defendant refused, and still refuses, to pay the same, and has not paid the same, or any part thereof. The complaint further alleges that after receiving said check, and on the same day he went to the place of business of Ralph Maxwell and William Van Dorn, in Lidgerwood, where he became intoxicated, and while so intoxicated he was induced by said Maxwell and Van Dorn to gamble and take part in a game of chance played by means of an instrument known as a "roulette wheel"; that he played at said game of chance and wagered large sums of money thereon; that for the purpose of playing the same was induced to indorse and did indorse the check in question, and delivered the same to the said Maxwell for the purpose of paying money lost by plaintiff, and claimed to have been won by said Maxwell and Van Dorn, in said gambling transaction; that on the following day, to-wit, December 19, 1899, and prior to the presentation of said check to defendant for payment, the plaintiff notified the defendant of the facts in reference to the loss of said check and of the possession thereof by Maxwell and Van Dorn, and instructed said defendant not to pay the same when presented. The answer admits the deposit of money by plaintiff, and the issuance of the cashier's check as alleged in the complaint, but by a denial places in issue the facts as to the loss and notice of loss of the check alleged in the complaint and alleges that "said cashier's check was, on or about the 19th day of December, 1899, presented to the defendant in the usual course of business for payment, by the then holder and owner of said check, properly indorsed by the signature of the plaintiff upon the back of said check, and was, by said defendant, in the usual course of business, paid to the holder of said check." This appeal presents for review the order overruling defendant's motion for a new trial, which involves a consideration of the grounds upon which the motion was based. The errors specified in the statement of case on which the motion was made are 18 in number. They need not be discussed separately. So far as they are important to a review of the order denying the motion for a new trial they are disposed of by our conclusion on the questions which we shall hereafter discuss.

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the assignments of error, a brief statement of facts is necessary. It is established by undisputed evidence that on the 18th day of December, 1899, the plaintiff, Drinkall, deposited in the defendant bank in Lidgerwood the sum of $200, and received therefor the the cashier's check in suit, which check was signed by the assistant cashier of the bank, drawn on said bank, and made payable in terms to the plaintiff. Thereafter, in the evening of the same day, Drinkall went into a gambling house in Lidgerwood, which was operated by Ralph Maxwell and William Van Dorn, which is known in the record as "Maxwell's Blind Pig," where he drank sufficient liquor to render him intoxicated, and while so intoxicated he was invited into a rear room in the building by Van Dorn, and there engaged in the gambling game operated by the gambling device known as a "roulette wheel." When he entered their place of business, he had in his possession $28 in money and the cashier's check in question. During the progress of the game he exchanged his ready cash for chips and when they were exhausted, which was at about 11 o'clock p. m., at the request of Van Dorn, he signed his name upon the back of the check in question, and delivered the same to Maxwell in exchange for more chips and some money to be used in playing said game. At 2 o'clock in the morning Drinkall was without money, check or chips. The wheel was stopped, and Drinkall, whose condition was unsteady from frequent libations during the progress of the game, was, at Maxwell's request, given another drink, and led upstairs, and put to bed. Before doing this, Maxwell had him again write his name on the check, his former signature not being satisfactory. On the morning of the 19th, Maxwell presented the check at the bank's office, duly indorsed by himself, and the same was paid in full by the defendant. As to the foregoing facts there is no controversy. They establish the deposit by plaintiff, the issuance to him of the check in question, the transfer of the check by indorsement to Maxwell and Van Dorn in a gambling transaction, and the payment of the same to said Maxwell by the defendant.

One of appellant's contentions is that "the evidence is insufficient to show that the bank had knowledge or notice of sufficient facts to put it on inquiry as to the invalidity of plaintiff's indorsement of the cashier's check or of the illegality or insufficiency of the consideration upon which such indorsement was made," and that, therefore, it was error to deny the motion for a new trial on this ground alone. Before referring to the evidence as to notice to the defendant, it is important to determine the legal rights and obligations of the parties to the instrument, and with that end in view we will consider in order (1) the character of the cashier's check upon which the plaintiff bases his cause of action; (2) the legal effect of the indorsement made in the gambling transaction, and (3) the duty of the defendant as to payment of the cashier's check.

A cashier's check, so-called, differs radically from an ordinary check. The latter is merely a bill of exchange drawn by an indi-

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A cashier's check, so-called, differs radically from an ordinary check. The latter is merely a bill of exchange drawn by an indi-

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vidual on a bank, payable on demand; or, in other words, it is an order upon a bank purporting to be drawn upon a deposit of funds, for the payment of a certain sum of money to a person named, or to order or bearer, on demand. As between himself and the bank, the drawer of the check has the power of countermanding his order of payment at any time before the bank has paid it, or committed itself to pay it. 5 Am. & Eng. Enc. Law (2d Ed.) 1079, and cases cited. When the check, however, is certified by the bank, the power of revocation by the drawer ceases, and the bank becomes the debtor. 1 Morse, Banks, § § 398, 399. A cashier's check is of an entirely different nature. It is a bill of exchange, drawn by the bank upon itself, and is accepted by the act of issuance; and, of course, the right of countermand, as applied to ordinary checks, does not exist as to it. 2 Rand. Com. Paper, § 588; 1 Daniel, Neg. Inst. 444; 1 Pars. Notes & B. 288. The bank, in such case, is the debtor, and its obligation to pay the cashier's check is like that of the maker of any other negotiable instrument payable on demand. As applied to the case under consideration, the rights and obligations of the plaintiff and defendant as to the cashier's check in question were those of a payee and maker of a negotiable promissory note payable on demand.

What was the legal effect of plaintiff's indorsement, being based upon a gambling transaction? The solution of this question, under the authorities, is difficult, by reason of the difference in statutes on the subject, and also because of the conflict in the common law, both in England and in the United States. At early common law in England, gambling contracts, when fair and free from cheating, were assumed by the courts, without discussion, to be valid. Later the courts were disinclined to entertain actions based on gambling contracts; but still later they returned to the original rule that such contracts were valid and actionable, excepting therefrom, however, certain classes of wagering contracts. In the United States, in a number of the states it is held that the common law of England upon gambling contracts is unsuited to the conditions and institutions, and that all gambling contracts are void by their common law. In others it is held that the English statutes against gambling passed prior to the American revolution are in force in their jurisdiction as common law, or as adopted by statute in general terms. Still another class of states hold that the common law of England on the subject of gambling contracts is in force, and that gambling contracts not of the forbidden classes are valid, and enforceable by their common law. See cases cited in 14 Am. & Eng. Enc. Law (2d Ed.) 586, 590. In Illinois, under the peculiar statute of that state, it has been held that an indorsement of commercial paper on a gambling consideration is void, and, although in the hands of an innocent holder for value, the legal consequence of such an indorsement is of no more effect than a forged indorsement (*Chapin* v. *Dake*, 57 Ill. 295, 11 Am. Rep. 15; and the property in the instrument remains in the payee unaf-

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fected by such indorsement (*Bank* v. *Spaids*, 8 Ill. App. 493). So, also, under the statutes of Mississippi declaring all gambling contracts utterly void, the maker of a note payable to an individual named or bearer, when sued by another than the party named as payee, may successfully defend by showing that the plaintiff won the note on a wager. *Holman* v. *Ringo*, 36 Miss. 690; *McAuley's Adm'r* v. *Mardis*, Walk. 307; *Adams* v. *Rowan*, 8 Smedes & M. 624 *Lucas* v. *Ward*, 12 Smedes & M. 157; *Martin* v. *Terrell*, Id. 571; *Smither* v. *Keys*, 30 Miss. 179. The same is true under the Iowa statute, and a promissory note so given is void even in the hands of an innocent holder for value. *Bank* v. *Alsop*, 64 Iowa, 97, 19 N. W. Rep. 863. See, also, *Conklin* v. *Roberts*, 36 Conn. 461; *Swinney* v. *Edwards*, (Wyo.) 55 Pac. Rep. 306, 80 Am. St. Rep. 916. In this state there is no statute declaring in express terms that all contracts in furtherance of gambling are void, as in the above states. But gaming itself is made unlawful by chapter 37 of the Penal Code (Revised Codes 1899), which chapter, in its prohibitions, extends to the game at which the plaintiff herein lost the check in suit. It is entirely clear, and, indeed, it is not controverted, that the transaction in which the indorsement of the note by plaintiff to Maxwell was made was one prohibited by express law, and that the consideration for such indorsement was illegal. Of what legal effect, then, we may ask, was the indorsement? Did it have the effect of transferring the check to Maxwell as an innocent purchaser, and enable him to legally enforce payment from defendant, notwithstanding the unlawful means by which the possession and indorsement were obtained? Defendant's counsel contend that it did have such effect, and that, had the defendant refused to pay him, it could, under the law, have been compelled to do so, even though it had notice of the entire gambling transaction. This contention we cannot sustain. It is not, however, without specious reason and respectable authority to support it. The well-settled rule of law and equity is invoked by the defendant, "In pari delicto potior est conditio possidentis," under which neither party to an illegal contract may be aided by the courts, either to set it aside or enforce it; or, as was said in *Roll* v. *Raguet*, 4 Ohio, 400, 22 Am. Dec. 759: "Whenever the agreement is immoral, or against public policy, a court of justice leaves the parties as it finds them. If the agreement be executed, the court will not rescind it; if executory, the court will not aid in its execution." And in *Atwood* v. *Fisk*, 101 Mass. 363, 100 Am. Dec. 124: "It will not recognize a right of action founded on the illegal contract in favor of either party against the other." This court had occasion to apply the rule to a Sunday transaction, which was alleged to have been illegal, in *Rosenbaum* v. *Hayes*, 10 N. D. 311, 86 N. W. Rep. 973, and we there held that, so far as the transaction was executed the law leaves the parties where their unlawful acts have placed them. In addition to the cases cited in the opinion in that case, see also, *Kahn* v. *Walton*, 46 Ohio

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St. 195, 20 N. E. Rep. 203; *Spring Co.* v. *Knowlton,* 103 U. S. 49, 26 L. Ed. 347; *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.,* 145 U. S. 393, 12 Sup. Ct. 593, 36 L. Ed. 748, 15 Am. & Eng. Ec. Law (2d Ed.) 999. Under the same authorities, and for the same reasons, so far as it is executory, the contract is not enforceable. 2 Pom. Eq. Jur. § 939. It is contended that the indorsement and delivery of the check in this case was an executed transaction, and that, accordingly, under the foregoing rule, the plaintiff lost all of his rights in the check, and that Maxwell acquired the same. In support of this position counsel for appellant cite *Reed* v. *Bond,* (Mich) 55 N. W. Rep. 619, and *Kahn* v. *Walton,* (Ohio) 20 N. E. Rep. 203. *Reed* v. *Bond* is similar to the case at bar, and is squarely in point and upholds counsel's view. It rests, however, upon the declaration that the gaming contract was fully executed. The unsoundness of this contention lies in the assumption that the contract of indorsement was valid and complete. "An indorsement is a written contract, the terms of which, though usually omitted for the convenience of commerce, are certain, fixed, and definite, and not the less perfectly understood because not expressed in words." It, "like any other written promise or agreement, requires two things besides the mere writing to constitute a contract, viz., a delivery and a consideration," and "the delivery and consideration are always open to impeachment." (4 Am. & Eng. Enc. Law [2d Ed.] 485, 487, and cases cited); and the general rule that parol evidence is inadmissible to contradict, vary, or add to a written contract does not preclude the admissibility of such evidence to show the illegality of a contract. In such case the evidence is not admitted to vary or control the contract, but to show that in contemplation of law, in consequence of the proven illegality, no contract at all ever had any existence; that it was void ab initio." And it is further held that "when the defendant does not set up the defense of illegality, but such illegality appears from the case as made by either the plaintiff or defendant, it becomes the duty of the court sua sponte to refuse to entertain the action." 15 Am. & Eng. Enc. Law, 1015, and notes; *Johnson* v. *Willard,* 83 Wis. 420, 53 N. W. Rep. 776. It is clearly the plain policy of the law not to extend aid to either party to an unlawful transaction, and to refuse to recognize rights or entertain actions which arise from acts which are under its condemnation.

Does the application of these principles to the facts of this case make Maxwell an indorsee in due course, and clothe him with all of the rights of a good-faith purchaser for value? A negative answer to this question must be given. In the first place, the contract of indorsement was defective, and subject to impeachment, by reason of the admitted illegality of the consideration,—this upon elementary principles of the law of contracts. The defective indorsement did not, in our opinion, constitute a contract to which the principle invoked could apply. It is clear that Maxwell could not suc-

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cessfully maintain an action against the plaintiff upon the indorsement; and it would seem that the courts would not aid him to enforce payment from defendant for the sufficient reason that his right of action would arise out of the indorsement made in the unlawful gambling transaction. On the other hand, plaintiff is not seeking the aid of the court in this action to enforce a gambling contract, or of any right growing out of the indorsement, but is merely attempting to enforce the defendant's promise to him contained in the cashier's check, which is not tainted by any illegality whatever. His cause of action does not arise in the gambling transsaction; whereas the defense of payment, which is relied upon to defeat a recovery by plaintiff, rests entirely upon an affirmance of the transfer of the check in the gambling transaction, for on no other ground could Maxwell, after notice, have the right to receive or enforce payment. As has been already stated, the courts will not recognize and enforce rights arising on illgotten title. *Kirkpatrick* v. *Clark,* 132 Ill. 342, 24 N. E. Rep. 71, 8 L. R. A. 511, *22* Am. St. Rep. 531; *Miller* v. *Marckle,* 21 Ill. 152; *Riedle* v. *Mulhausen,* 20 Ill. App. 68; *Cochran* v. *Strong,* 44 Ga. 636; *Express Co.* v. *Duffey,* 48 Ga. 358. On principle therefore, we have reached the conclusion that the title, rights, and possession of the check by Maxwell, under the facts as they appear, are directly analogous to those of the finder of a lost note which has been indorsed by the payee, or of such an instrument in the hands of one who has stolen it. Prima facie, every holder of a negotiable instrument is deemed a holder in due course, both under the law merchant and under the statute of this state. See § 59 of chapter 100 of the Civil Code (Rev. Codes 1899), which is the chapter governing negotiable instruments executed after July 1, 1899; 2 Rand. Comm. Paper, § 730; *Million* v. *Ohnsorg,* 10 Mo. App. 432. And "the mere possession of a negotiable instrument which is payable to the order of the payee, and is indorsed by him in blank, or of a negotiable instrument payable to bearer, is in itself sufficient evidence of his right to present it, and to demand payment thereof. And payment to such person will be valid, unless he is known to the payor to have acquired possession wrongfully." 1 Daniel, Neg. Inst. § 573, and cases cited in notes. If any doubt could exist as to the correctness of our conclusion that Maxwell's title to the check was imperfect, and the contract of indorsement legally unenforceable either against the indorser or the payor, it is set at rest by section 55 of the act above referred to, which reads as follows: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear or unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." The above statute was in force when the transaction in question took place, and is controlling. Under said section Maxwell's title was defective for two reasons: First, he procured the sig-

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nature of plaintiff by unlawful means; and, second, he obtained the check for an illegal consideration. Further, the fact is established that he was not a holder in due course, and had not the rights of such a holder, for the reason that he did not take the instrument in good faith and for value, which is one of the requirements to render a holder a holder in due course under section 52 of the chapter above referred to.

The rule as to the payment and discharge of negotiable instruments is that payment of the bill or note must be made to the rightful holder or his authorized agent. "In general, a payment is valid as against other parties when made in good faith, and in ignorance of all facts which impair the holder's title. * * * If payment is made to one who holds under a blank indorsement, his possession will be presumptive evidence of his title and right to receive the money. Any one in possession is entitled prima facie to receive payment of a note payable to bearer, or to 'A., or bearer.' If it is so payable, even a payment made in good faith to a thief or finder who is in actual possession will be good. * * * But a payment made through negligence to one who is neither the rightful holder nor a bona fide purchaser before maturity, after notice of loss, will not be sufficient." 3 Rand. Com. Paper, § 1444, and cases cited. And the same author says in § 1467 that, "if the indorsement is for an illegal consideration, such as a gambling debt [and that is this case], payment made to the indorsee after notice of that fact will be of no avail as against the indorser:" citing *Bank* v. *Spaids,* 8 Ill. App. 493, and *Wheeler* v. *Winn,* 38 Vt. 122. Under the above doctrine, which appeals to us as both just and sound, it is apparent that the defense of payment to Maxwell, the indorsee—which is the only defense in the case—turns entirely upon the question as to whether such payment was made in good faith, and without notice of the defect in Maxwell's title; for, as before stated, payment by the maker to a party who claims to be a bona fide holder is not sufficient to protect the maker against the claim of the real owner, when made after notice. *Bainbridge* v. *City of Louisville,* 83 Ky. 285, 4 Am. St. Rep. 153.

The remaining question relates to the sufficiency of the evidence as to defendant's notice. The jury found that the defendant had notice, and the trial court refused to grant a new trial upon the ground of the alleged insufficiency of the evidence to sustain such finding. Our inquiry is limited to ascertaining whether there is any legal evidence in the record fairly tending to sustain this finding. "Under an established rule of practice, this court will not ordinarily disturb a verdict upon a mere question of fact, where there is substantial evidence upon which the verdict may rest." *Heyrock* v. *McKenzie,* 8 N. D. 601, 80 N. W. Rep. 762; *Taylor* v. *Jones,* 3 N. D. 235, 55 N. W. Rep. 593; *Black* v. *Walker,* 7. N. D. 414, 75 N. W. Rep. 787; also, *Flath* v. *Casselman,* 10 N. D. 419, 87 N. W. Rep. 988. We find the evidence contained in the record sufficient to support the finding of the jury on this

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point. It discloses that plaintiff went to defendant's place of business in the morning of the 19th,—the next day after he had made the deposit,—and before the bank opened for the day. Maxwell and Mr. Movious, the president of the bank, were then on the inside of the building. After entering, the plaintiff called Maxwell aside, and tried to induce him to return the check, or all or a part of the money, telling him that he had made him sign the check, and had practically stolen it. Maxwell refused. The paying teller's window was opened just at that time, and Maxwell stepped up, and presented the check to Nellie Sanders, the paying teller, for payment. The plaintiff said to her: "Madam, I cancel that check. I don't want you to pay it." Plaintiff testifies: "When I demanded the cancellation of the check, she took the check, and asked if that was my name, and I said, 'Yes,' and she said * * * I would have to go and see Mr. Movious. * * * I went and called him, and he came out, and she had paid the money to Maxwell, and he was going out the door. I asked him [Movious] why that money was paid, and he said, 'Because your name was on the back;' and I said, 'I shall have to try and get that money back.' 'Well,' he said, 'you go ahead, and find a way to get it back.'" Nellie Sanders, in narrating the circumstances under which the payment was made, says: "Mr. Maxwell came in a little before nine in the morning. The outside door was open. We had not yet opened the curtain. E. A. Movious, the president of the bank, came in, and told Miss Movious (the assistant cashier) that she had better open up; that it was not quite nine, but she had better open up, as he thought Ralph Maxwell wanted something. * * * As soon as the curtain was up, Maxwell pushed the check through the cashier's window. It was already indorsed by himself and John Drinkall. * * * I turned, and took up the signature book, to see that it was properly indorsed, and as I did so Maxwell said: 'It is all right. I have indorsed it. I am good for it.' Drinkall stood right by Maxwell, and said, before it was paid, 'I demand it canceled.' Maxwell replied, 'That is all right.' After seeing that the signature was correct, I proceeded to count out the money. While I was doing this, Drinkall several times said, 'I demand it canceled.' To each such statement Maxwell replied, 'That is all right or some such answer. I supposed he was talking to Maxwell, and because he was under the influence of liquor I paid less attention to him. Maxwell said to him, 'You can go and see Emil' (meaning Movious). He was in the private office. He went in there, and when he returned I had paid the check to Maxwell." E. A. Movious testifies in part: "After the bank had opened, Drinkall and Maxwell were standing together in the office. I don't know what they were talking about. As soon as Drinkall came in, he said to me, 'I want that canceled;' and I said 'What do you want canceled?' and he said, 'I want that check or money.' * * * I stepped out to him, and Maxwell was standing in front

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of the bank window, and had the money counted. * * * I said, 'Is that your signature on the back?' and he said 'Yes.' 'Well,' I said, 'I don't know how I can help you. It is paid;' and I passed it back." There is other testimony in the record going more into the details of payment, but that above quoted is sufficient for the purpose of this decision. We have reached the conclusion that the facts as detailed were sufficient to warrant the jury in finding that defendant had notice of the defect in Maxwell's title, and to make its act in paying the check to him an act of bad faith. Section 5118, Rev. Codes, provides that "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." The plaintiff had deposited this money only the day before. Movious admits that he knew Maxwell conducted a gambling establishment. It appears that he ordered the bank opened before the regular time to accommodate Maxwell, and, further, that the check was paid to Maxwell in open defiance of the plaintiff's personal and repeated protests against its payment to him. These facts and circumstances might well be held by the jury to be sufficient to put a prudent man upon inquiry as to how Maxwell had obtained the check, and that an inquiry made with reasonable diligence would have disclosed the entire transaction is entirely apparent. A simple inquiry by the bank's officers for his reasons for demanding that Maxwell should not be paid would have made known the specific defect in the latter's title.

But we are also of opinion that the evidence is sufficient to sustain a finding by the jury that defendant had not only constructive notice, but actual notice, that plaintiff, and not Maxwell, was the owner of the note, and entitled to payment. It is true, the language he used, "I cancel that check; I don't want you to pay it," would be more appropriate to a countermand by the maker of a check, in which case the language would be strictly within the legal right of the party countermanding payment. But in considering the question of notice we are not controlled by the technical language used. The question here is whether Drinkall brought home to the bank knowledge of Maxwell's defective title before it parted with its money. We are constrained to hold the evidence sufficient for that purpose. The language of his demand, when taken in connection with the other circumstances, would fairly mean that plaintiff claimed that he, and not Maxwell, was the owner of the check. Prima facie, Maxwell was entitled to receive payment; but when his title was challenged by the plaintiff, as it was, the defendant paid it at the peril of having to pay the rightful owner.

Finding no error in the record, the judgment is affirmed. All concur.

WALLIN, C. J. I concur in the result. Upon the question of notice to the bank, I am of opinion that there was competent evi-

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dence tending to show notice, and that the question of notice was properly submitted to the jury.
(88 N. W. Rep. 724.)

STATE *ex rel.* GEORGE C. WILES *vs.* CHRIST ALBRIGHT.

Mandamus—Compliance—Appeal.

On a motion to dismiss the appeal in this case, it appeared that a peremptory writ of mandamus was issued and served on the defendant. It called upon him to issue a county warrant for $635.81. The relator demanded the warrant, and threatened to proceed against the defendant for disobeying an order of court, and to have him arrested for contempt in case of refusal to comply with the mandate. The defendant thereupon issued a warrant for $395. *Held*, that the mandate was not fully complied with, and that compliance with an order of that kind would not defeat an appeal, as the rights of the parties were not finally determined by such issuance of the warrant, as restitution could be compelled.

Pleading.

A county superintendent of schools initiated mandamus proceedings against a county auditor to compel a county warrant for his salary to be issued. The defendant answered that the relator had misrepresented the number of schools over which he had supervision in the county, and by reason of such misrepresentations had procured more salary than he was lawfully entitled to. No issue is raised by the pleadings as to the amount due, unless the sums thus claimed to have been overpaid are taken into consideration. *Held*, that the answer alleged facts which, taken as true, would not warrant the issuance of a peremptory writ.

Official Discretion Not Controlled by Mandamus.

Held, further, that the county auditor in such a case is vested with discretion, and mandamus will not lie to control such discretion.

Ministerial Function.

Held, also, that issuing a warrant for salary due and payable is a ministerial act, that will be compelled by mandamus, but, in cases where the facts create a well-founded doubt as to the validity of the demand for salary, the auditor has the legal right to refuse to issue the warrant, and that a writ of mandamus should not issue to compel him to do so, but the claimant will be required to resort to some other remedy.

Appeal from District Court, McIntosh County, *Lauder*, J.

Application by the state, on the relation of George C. Wiles, for writ of mandamus against Christ Albright, county auditor. Judgment for relator, and defendant appeals. Reversed.

A. W. Clyde and *Morrill & Engerud*, for appellant.

Herreid & Williamson, for respondent.

MORGAN, J. This is an appeal from an order and judgment granting a peremptory writ of mandamus commanding the defendant to issue a warrant to the relator for the sum of $635.81, claimed

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by the relator as due to him as his salary as county superintendent of schools of McIntosh county. The facts as recited in the affidavit on which the alternative writ of mandamus was issued, are the following, viz.: That the relator had been the duly elected and acting superintendent of schools of McIntosh county from the year 1897 until January, 1901; that the defendant was in January, 1901, and for two years prior thereto had been, the duly elected and acting auditor of said county; that during the school years ending June 30, 1899 and 1900, respectively, the actual number of schools held in said county, and over which relator had supervision, was 78 in 1899 and 83 in 1900; that the relator, as superintendent of schools, filed with the county auditor and county commissioners of said county the receipt of the superintendent of public instruction, showing that all reports required to be filed in said superintendent of public instruction's office had been duly rendered to said superintendent of public instruction and filed in the office of the relator, and that relator had filed, as such county superintendent, his certificate and report showing the actual number of schools over which he (the relator) had actual supervision during the school years commencing June 30, 1899, and June 30, 1900; that said defendant refused, after demand, to issue to the relator a warrant for the salary due him as such superintendent of schools for the months of June, July, August, September, October, November, and December of the year 1900, amounting in the aggregate to the sum of $688.33. Upon such affidavit an alternative writ of mandamus was issued, embodying the same allegations contained in the affidavit, and served on the defendant. The alternative writ ordered the defendant to show cause and make due return to said writ at Wahpeton on January 30, 1901. At such time and place the defendant made answer to said writ, and in said answer the following allegations were made in detail: A denial that the number of schools in said county over which relator had supervision in 1899 was 78, as claimed by him, and not more or greater than 69, and for 1900 not 83, as claimed by relator, and was not more than 69. A denial that relator filed any report with defendant showing the actual number of schools over which he had supervision, and a denial that defendant refused to issue a warrant to relator for his salary for the months named in the alternative writ, and a denial that there is any salary due him for said months. The answer further alleged that during the school year ending June 30, 1898, the relator's salary was paid, after having been allowed by the county commissioners upon bills presented by relator to that board, and duly verified by the oath of relator, to the effect that they were just and true; that thereafter, and up to the month of May, 1900, the relator demanded and received his salary from the defendant for the amount that relator claimed that he was entitled to. The answer contains a further allegation in the following words: "That in June, 1900, having reason to believe that the warrants by him issued to said relator, each in the sums last above

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mentioned, were considerably in excess of the amount actually accruing to him, made a report to the board of county commissioners of said county to that effect, and referred the matter to said board for determination at his semi-annual settlement therewith, during its July session for 1900. That said board, accordingly, in session, after a full hearing in the premises, at which said relator appeared in person and presented the grounds of his said claim to payment at said rate, gave its decision upon the evidence before it, finding that said relator had been overpaid as county superintendent since July 1, 1897, for the first year $160; for the second year, $160; and for the last preceding year up to April 30, 1900, $75; * * * and ordered that no more warrants be issued by this defendant, as county auditor, to said George C. Wiles, as compensation or salary as county superintendent, until there shall have been accrued to him by virtue of said office a sufficient sum to satisfy the amount of such overpayment. * * * That, deeming himself bound to obey the order of the board as aforesaid, defendant has since refused to issue warrants to the amount aforesaid for salary accruing to said relator from and after May 31, 1900, which being rated and determined as hereinafter stated, covered the salary so accruing to him for the months of June, July, August, September and part of October, 1900." Other facts are stated in the answer, which need not be recited, as these are, in our judgment, sufficient for a correct determination of the rights of the parties to the litigation. Upon the hearing the relator filed a paper called a "waiver," in which he disclaimed all rights to the sum of $52.52; being the difference between the amount claimed by him in his affidavit and the amount that would have been due relator, without off-setting the sum of $395 overpayments of salary made to the relator during the time between 1897 and May, 1900. The district court decided, as a matter of law, that a peremptory writ should issue upon the allegations of the pleadings without proof. From the order and judgment awarding the peremptory writ the defendant has appealed to this court, and has duly assigned errors based upon the action of the trial court in granting the writ, both upon questions of law and of fact.

The respondent moves to dismiss the appeal upon the ground, as alleged, that the mandate of the peremptory writ has been fully complied with, and that in consequence thereof there is no practical issue to be determined on the appeal. The facts on which this motion is based are: That a warrant for $395 was issued by the defendant and delivered to the relator imediately after the peremptory writ had been served on the defendant, and a demand for the warrant had been made on him by the relator. The service of the writ and the demand were made about 4 o'clock in the afternoon of February 20, 1901. The defendant objected to issuing the warrant then for the reason that he desired to consult with the state's attorney, who had then departed for his home, some six miles distant. The relator insisted on having the warrant then and there delivered to him, and threatened that, unless delivered, he would proceed

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against him for refusing to obey the order of the court, by having him arrested for contempt of court, and that, if he left that room without the warrant, it would be too late for him to save himself from the penalties following a refusal to obey the order of the court, thereafter. That fearing such arrest and imprisonment, and being ignorant of his rights under the circumstances, he issued the warrant for $395. Such are the circumstances under which the warrant was delivered to the relator, substantially as narrated in defendant's affidavit in opposition to the motion to dismiss the appeal. The relator contends that this was a voluntary compliance with the writ. The defendant contends that it was a compliance under duress, and, as such, not voluntary. We are not called upon to determine the effect of the threats made by the plaintiff upon the defendant, as it is clear to us that the motion should be denied upon another ground.

The writ commanded that the auditor issue a warrant for $635.81, without specifying any items comprising such sum. This sum was described as "salary." The auditor issued a warrant for $395 only. This left the writ uncomplied with to the extent of $240.81. The mandate is still unsatisfied, and to that extent, at least, remains as a command to be obeyed by the defendant if the judgment is affirmed. The disposition of this sum still remains to be made, and the fact that no issue was made concerning payment of this sum is immaterial, as the issues may be changed when reached for final adjudication, in view of the issuance of the warrant for $395. The nature of this order, however, is such that a compliance with it would not necessarily be considered as an abandonment of the right of appeal. Payment of an enforceable judgment is not of itself deemed in all cases such a compliance with the judgment as to deprive a defendant of his appeal. Unconditional payment of a judgment by the person against whom it is rendered, and an unconditional acceptance of such payment by the person in whose favor it is rendered, are radically different, as affecting the right to appeal. Accepting the benefits of a judgment, and an appeal therefrom thereafter, are acts inconsistent with each other. The unconditional payment and compliance with a judgment are not always matters of choice, and are therefore not always deemed voluntary, as a matter of law. Payment or compliance may be exacted by execution or commitment, and are therefore deemed involuntary. Payment or compliance as a matter of compromise, or under some special arrangement by which an appeal is agreed to be waived would be voluntary. But when made without conditions, and to avoid the enforcement of the judgment by due process of law, an appeal is not thereby barred. Because a person does not wish to risk the sacrifice of his property by forced sale, or does not wish to risk suffering the penalty of even temporary refusal to comply with the judgment, in cases where the giving of a supersedeas bond is inconvenient or impossible, or an immediate appeal cannot be taken, does not indicate a voluntary compliance with the

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judgment; and a denial of an appeal in such cases would often result in injustice and oppression. "It is said that, after making the deed which the court ordered, the appellant is bound by it, and cannot now prosecute this appeal. The principle is unsound. The deed recites on its face that it is made under the order of the court." *O'Hara* v. *McConnell,* 93 U. S. 150, 23 L. Ed. 840. "In no instance within our knowledge has an appeal or a writ of error been dismissed on the assumption that a release of errors was implied from the facts that money or property had changed hands by force of the judgment or decree. If this judgment is reversed, it is the duty of the court to restore the parties to their rights. *Erwin* v. *Lowry,* 7 How. 184, 12 L. Ed. 660. See, also, *Martin* v. *Johnson,* 128 N. Y. 605, 27 N. E. Rep. 1017; *Grim* v. *Semple,* 39 Iowa, 570.

The cases holding that a compliance with the mandates of the peremptory writ justifies a dismissal of an attempted appeal proceed upon the theory that the acts ordered to be performed, and actually performed pursuant to the writ, are such that a reversal of the judgment granting the writ would have no effect upon the act performed. If a reversal of the judgment in this case would not and could not have any effect upon the rights of the parties, so far as the issue of the $395 warrant is concerned, then the principle laid down in the following cases would be applicable: *In re Kaeppler,* 7 N. D. 307, 75 N. W. Rep. 253; *Leet* v. *Board* (Cal.) 47 Pac. Rep. 595; *Foster* v. *Smith,* Id. 591; *San Diego School Dist. of San Diego Co.* v. *Board of Sup'rs of San Diego Co.,* 97 Cal. 438, 32 Pac. Rep. 517; *In re Manning,* 139 N. Y. 446, 34 N. E. Rep. 931; *People* v. *Common Council of City of Troy,* 82 N. Y. 575. But we do not understand that the action of the county auditor in delivering the warrant to the relator gave him such rights to the warrant, or to the money received thereunder, as to render him not liable to account therefor, in a proper action, in case it is judicially determined that he was not lawfully entitled thereto. In such event he may be compelled to restore the property received, or to account therefor. *Hiler* v. *Hiler,* 35 Ohio St. 645; *Chapman* v. *Sutton,* 68 Wis. 657, 32 N. W. Rep. 683; *Richeson* v. *Ryan,* 56 Am. Dec. 493. Under the evidence the issuing of the warrant to the respondent did not necessarily finally determine the rights of the parties in relation thereto. It follows that a practical issue remains unsettled as the record now stands, and the motion to dismiss the appeal is therefore denied.

The remaining question is, did the facts as stated in the answer, taken to be true, justify the county auditor in refusing to issue a warrant to the relator for the amount lastly claimed by him as due him for salary? In other words, are the provisions of the statute conferring upon the auditor the power to issue warrants for salaries to county officers mandatory upon him, or is he vested thereunder with any discretion in relation to that matter Section 652, Rev. Codes 1899, relating to salary of county superintendents, provides, "And the same shall be paid out of the county general fund monthly

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upon the warrant of the county auditor." Section 1919 provides, "Warrants for salary of county officers may be drawn by the county auditor from time to time as such salaries become due and payable." It is claimed by the defendant in his answer that the relator had, during his said term of office, drawn more money from the county treasury, by reason of having wrongfully collected salary based on a claim that there were more schools in the county than there were in fact; in other words, that the relator had made false reports and claims, and drawn salary based on such false claims or demands; that the auditor discovered the fact of such overclaims and overpayments, and reported the fact to the county commissioners; that they investigated the facts, and found them to be as reported by the auditor, and ordered him to issue no more warrants until the accrued salary should equal the amount of such overpayments, $395; and that he refused to issue warrants between May and October, 1900, for the reason that he was so ordered. The basis of his refusal in reality is, as claimed by him, that no salary was due the relator; that he had been fully paid before said time; and that he was ordered not to deliver to relator any more warrants. The sufficiency of this answer is the sole question to be determined by us. In ordinary cases of salaries fixed by law, and not paid, and actually due, it is not denied that the absolute duty to issue warrants therefor devolves upon the auditor, under the statute, and that he is not bound to submit to the directions of the county commissioners, or any one else to withhold the issuing of such wararnts. In such cases he has no discretion. The law will compel him, by mandamus, to issue warrants for such salaries. In those cases his acts are ministerial, merely, no doubts existing and no facts apeparing as to the validity or payment of the salary, the law favors prompt payment of the salary to officials, that they may fulfill their personal obligations by payment. In this case there is no contention that the salary is not due and payable, unless the fact as claimed, that there has been an overpayment of $395, is to be considered. The commissioners found that the relator had overdrawn his salary to that extent. The question of the county superintendent's salary, so far as auditing the same is concerned, pertained to the duties of the auditor, and not to the duties of the county commissioners. However, the county commissioners are intrusted with the management of the fiscal affairs of the county. They investigated the matter of the sum due the couny superintendent for salary, and what sum was overpaid. So far as concerns this investigation of moneys paid to, or overpaid to, the superintendent, or any county officer, the general powers conferred upon the board by the statute would seem to be broad enough to authorize such investigation, and make it a duty incumbent upon them to do so. The board has power to institute and prosecute actions on behalf of the county, and to make all orders respecting the property of the county; to audit the accounts of all officers having the care or disbursement of the county's money. Sections

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1905, 1906, Rev. Codes 1899. The board having made such investigation, the result was communicated to the auditor. Whether the board had ample statutory authority to conduct such investigation or not is not material in this case. It resulted in bringing to the auditor's attention the fact that it was claimed that the county superintendent had overdrawn his salary, and was indebted to the county by reason of such overpayment. Had the same information been brought to the auditor from any other source, the conclusion would be the same. In fact, he was advised in some way of such overpayment before the matter was brought to the board's attention. In view of such knowledge, confirmed by an order from the commissioners not to pay the relator's salary until the overpayment had been wiped out by accrued salary, was it the duty of the auditor to issue his warrant, under these circumstances? We think not. He is the agent of the county, intrusted with the duty of careful performance of all acts devolving upon him. To deliver a warrant to the relator when it appeared that there was reasonable ground to believe that none was due him, and that he had been paid for the services for which he asked the warrant, would have been acting contrary to the interests of the county. Was the relator entitled to a writ of mandamus against the auditor, under the facts alleged in the answer? The writ will issue to compel payment of salaries of public officers, when fixed by law, and when due and payable. Such is the general rule. *Smith* v. *Dunn*, 64 Cal. 164, 28 Pac. Rep. 232; *State* v. *Hickman*, 9 Mont. 370, 23 Pac. Rep. 740, 8 L. R. A. 403; *State* v. *Hastings*, 15 Wis. 83. If the allegations of the answer be true, there was not anything due to the relator for salary. He had been paid, not that identical salary, but what was its equivalent. The writ of mandamus will not be issued, except in cases where the right to it is clearly shown. In cases of doubt, based on reasonable grounds arising from existing facts, it will not issue. It is not issued as a matter of strict legal right in all cases. If the auditor was vested with any discretion under the circumstances, in regard to issuing the warrant, mandamus was not the proper remedy. If the duty was purely a ministerial one, the writ should issue. In view of the facts brought to his notice, we think it was his duty to refuse the warrant to the same extent as though it was his individual affair. As auditor, he is the representative of the county, and is trustee of its interests. No different rule should apply in cases of issuing warrants by auditors and paying them by treasurers. Rspecting the duty of treasurers the supreme court of Illinois has said: "Hence, as a general rule, mandamus will lie to compel a county treasurer or other disbursing officer to pay an order legally drawn upon funds in his hands subject to the payment of such order. * * * But where, in such case, by reason of a complication of extraneous circumstances not specifically provided for by statute, a well-founded doubt arises either as to the right of the applicant to receive the fund, or the duty of the officer to pay it out, mandamus

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is not the proper remedy. The right in such case being doubtful, the claimant must resort to some other appropriate remedy to determine it." *People* v. *Johnson*, 100 Ill. 537, 39 Am. Rep. 63. The supreme court of Nebraska said in *State* v. *Cook*, 43 Neb. 318, 61 N. W. Rep. 693: "He [treasurer] acts only under the authority given by the council acting in accordance with law, when he makes payment. Without such authority a payment by him would be wrongful, and subject him to personal liability. We cannot, in an application for a mandamus against him, undertake to try the disputed claims of the relator and the bondholders. The bondholders are not parties to the suit, and the city is not a party. The relator has not shown a clear legal right." In *Evans* v. *Bradley*, 4 S. D. 83, 55 N. W. Rep. 721, it was said: "It is the duty of the county treasurer, under ordinary circumstances, to pay warrants drawn according to law by the board of county commissioners, when he has funds in his hands for that purpose. If however, he has reasonable grounds to question the legality of the warrant, or the power of the county commissioners to draw the same, he is justified in refusing to pay such warrant until the validity of the same is established by the judgment of a court of competent jurisdiction." If the matter of issuing warrants for salaries were under the direction of the county commissioners in this case, it would have been their duty to refuse its issuance; and the auditor, as the agent of the county, had the right to interpose the same defense. Under the facts as alleged, and to be taken as true until overthrown by proof, the auditor was under no legal duty to issue the warrant; and, in the absense of such legal duty, mandamus could not confer the legal authority upon him to do so. The law confers the duty to do the act. The duty pre-exists, and the writ compels its performance. Under the facts as pleaded, the auditor had a discretion to exercise as to his official actions, and mandamus will not lie to cause him to act when he is vested with such discretion. *Oliver* v. *Wilson*, 8 N. D. 590, 80 N. W. Rep. 757, 73 Am. St. Rep, 784, and cases there cited; *Territory* v. *Woodbury*, 1 N. D. 85, 44 N. W. Rep. 1077.

The answer, as set forth herein, alleges facts which, if true, show that the relator had drawn money from the county to which he was not then entitled, that he has receivd compensation as superintendent of schools upon a basis of more schools than were actually kept in that county at that time, and that in consequence of such fact he was overpaid his salary, caused by the relator's misrepresentations of the facts. It is claimed by the relator that such facts, even if true, afford no ground for the defendant's refusal to issue his warrant for the amount of the salary accrued; that such overpayment, even if made, is a matter to be adjudicated in a proceeding or action between the relator and the county; that the auditor should have issued the warrant, and if it was an overpayment, and known to be such by the auditor, he should nevertheless not interpose any objection, as the matter involved moneys due to the county, over which

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the auditor had no official duty to perform. We cannot acquiesce in this reasoning. The effect of it is to make the auditor in such cases a mere machine, without power or authority to protect the county's interests from any demands, although known by him not to be valid. In a suit between the relator and the auditor, as individuals, involving similar overpayments, the right of the auditor to recover such overpayments would not be questioned. Having been made under reliance on false representations, no question of voluntary payment could be successfully raised. In a similar suit between the relator and the county, such overpayments, so induced, could be recovered back or off-set against accrued demands of the relator. There existing no power to overpay the salary, the fact that it was done had no binding force, and it could be recovered back. *Adams Co.* v. *Hunter,* (Iowa) 43 N. W. Rep. 208, 6 L. R. A. 615; *Sheibley* v. *Dixon Co.,* (Neb.) 85 N. W. Rep. 398; *U. S.* v. *Burchard,* 125 U. S. 176, 8 Sup. Ct. Rep. 832, 31 L. Ed. 662; *Lumber Co.* v. *McIntyre,* (Wis.) 75 N. W. Rep. 964, 970, 69 Am. St. Rep. 915. In *Bogan* v. *Holder,* (Miss.) 24 South. Rep. 695, it is said, in a case very much in point with the case at bar: "Was the auditor authorized to withhold in his next settlement with the assessor the amount erroneously overpaid in the settlement for the preceding year? Or, to state it more accurately, should the petitioner be allowed in this mandamus proceeding to recover from the state the amount withheld by the auditor on account of the former overpayment, when he has already received from the state the full amount to which the law entitles him? May he compel the state to pay him for the year 1897 the full sum of $300, when he is the debtor to the state for the sum demanded, by reason of the overpayment for the year 1896? * * * It is said, 'Let the state bring suit against the assessor, if he has its money.' True the state might do that; but why grant a mandamus to compel the state to pay, when it clearly appears that the assessor is indebted to the state in exactly the sum sought to be recovered in the mandamus proceeding? The writ of mandamus is not strictly one of right. Our Code has assimilated the action of mandamus to other ordinary actions but the courts may still grant or deny the writ according to the circumstances of the case. See, also, *Weeks* v. *Town of Texarkana,* (Ark.) 6 S. W. Rep. 504; *City of Tacoma* v. *Lillis,* (Wash.) 31 Pac. Rep. 321, 18 L. R. A. 372.

Our conclusion is that the auditor showed facts in his answer entitling him to have the alternative writ of mandamus dismissed. Such a dismissal of the writ would have deprived him of nothing in the way of actual compensation due him, as he had an adequate and speedy remedy against the county by an ordinary action.

The order and judgment awarding the peremptory writ of mandamus are reversed, and the district court is directed to dismiss the proceeding. All concur.

(88 N. W. Rep. 729.)

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STATE *ex rel* GEORGE C. WILES *vs.* GOTTFRIED HEINRICH.

Trial De Novo—Error Apparent on Face of Judgment Roll.

A motion to affirm a judgment, where appellants demand a trial of the entire case in this court, under section 5630, Rev. Codes 1899, which is upon the sole ground that the statement of case does not contain all of the evidence offered at the trial, will be denied, even though the statement is insufficient to authorize a retrial, when error is properly assigned in appellants' brief upon the judgment roll proper.

Mandamus—How Reviewed.

Whether a mandamus proceeding, as to the manner of trial in the district court and retrial in this court, is governed by § 5630, Rev. Codes 1899, not determined.

Appropriation for Schools—Clerk Hire.

That portion of § 652, Rev. Codes 1899, which provides that "in counties having sixty schools the board of county commissioners shall appropriate one hundred dollars for clerical assistance in the county superintendent's office and five dollars for each additional school to be paid monthly. * * *" construed. *Held*, that the appropriation required to be made by said section is not for the personal benefit of superintendents, but is to create a fund to pay the county's obligation to such clerks as shall be lawfully employed in that office. *Held*, further, that said section does not make county superintendents custodians of such funds, or authorize them to audit the accounts of clerks which are to be paid therefrom. Such accounts are to be audited and paid the same as other accounts, the amounts of which are not fixed by law.

Relator Not Entitled to Sue Out Writ.

The trial court found that the relator during his incumbency of the office of superintendent of schools had clerical assistance in his office; that the county made no appropriation therefor, and has not paid the clerks so employed, but that they were paid by the relator from his individual funds,—and, as a conclusion of law therefrom, found that the relator was entitled to a peremptory writ of mandamus, requiring the county commissioners to appropriate and pay to him the amounts due for such clerk hire. *Held*, that the conclusion is erroneous, for the reason that no clerk hire was due to relator, but, on the contrary, that, if any legal liability rested upon the county, it was to the clerks so employed; that such obligation still exists, and was not discharged by his unauthorized payments; further, that to permit a recovery by the relator would subject the county to a double liability.

Costs of Unnecessary Printing on Appeal.

Appellants, although successful in this court, are not entitled to recover for printing unnecessary and useless matter in their abstract. In this case their recovery for printing is limited to the 20 pages which contain the record on the questions which are properly presented for review.

Appeal from District Court, McIntosh County; *Lauder*, J.

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Application by the state, on the relation of George C. Wiles, for a writ of mandamus to Gottfried Heinrich and others, board of county commissioners of McIntosh county. Writ granted, and the board appeals. Reversed.

A. W. Clyde, State's Atty., and *Morrill & Engerud*, for appellants.

The remedy by mandamus is based exclusively on the necessity that may exist in extraordinary cases for the administration of a specific remedy in order to obviate a failure of justice. The doctrine of necessity inheres in the remedy. It cannot properly be called into use unless it becomes necessary to apply it to the particular case in question. It cannot properly be administered as a cumulative remedy, or to control the administration of law in the ordinary course, by the appointed officers. Section 6110, Rev. Codes; 2 Bailey, Jurisdiction, § § 561, 563, 567, 573, 638 and 654; *State* v. *Wenzel*, 75 N. W. Rep. 580; *Territory* v. *Cole*, 3 Dak. 306; *Oliver* v. *Wilson*, 8 N. D. 594; *Territory* v. *Nowlin*, 3 Dak. 354; *State* v. *Carey*, 2 N. D. 45; *Kaeppler* v. *Pollock*, 8 N. D. 60; High on Ex. Rem. § § 338, 343, 345, 347. Where no injury will result from delay in the performance of the act sought to be enforced, where the right or duty is doubtful, the relator has slept on his rights or special circumstances render it inadvisable, courts refuse the writ. *Territory* v. *Wallace*, 1 N. D. 86; *Oliver* v. *Wilson*, 8 N. D. 594, 14 Am. & Eng. Enc. L. 97, and notes; High on Ex. Rem. 300; 2 Bailey, Jurisdiction, § § 569, 571, 587. The courts can compel the commissioners to decide a question, but cannot tell them how to decide it. 14 Am. & Eng. Enc. L. 98. The commissioners decision, if erroneous, can only be corrected by appeal. Section 1924, Rev. Codes; *Taubman* v. *Commissioners*, 84 N. W. Rep. 784; *Tillotson* v. *Potter Co.*, 71 N. W. Rep. 754; High on Ex. Rem., § § 345, 347. The case is not similar to one where the law fixes the amount of the claim and the commissioners sit only as auditors for the county. *Barrett* v. *Stutsman Co.*, 4 N. D. 175. In making appropriations for a given purpose to be expended in the future, the law vests in them power to decide the facts which determine the amount of or necessity for an appropriation. If their decision is erroneous an appeal lies. Section 1927, Rev. Codes. The commissioners can make no appropriation to a purpose not provided for by tax levy. Commissioners can levy taxes at July meetings only. Section 1228, Rev. Codes. The duty of the commissioners, under § 652, Rev. Codes, is to make appropriation for clerk hire. The amount to be expended is limited to what they appropriate for that year. If there is no appropriation there is no clerk hire. *Herron* v. *Lyman Co.*, 78 N. W. Rep. 996. There has been no demand for the performance of the act required. This is a fatal jurisdictional defect. Mandamus will not issue until after demand and refusal to do the act required. Sections 2626, 2630, Rev. Codes. Relator's application must affirmatively show every jurisdictional

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fact. 14 Am. & Eng. Enc. L. 106, 141; 2 Bailey, Jurisdiction, 590 and 563a. The writ should be refused because of unreasonable delay in applying for it. 14 Am. & Eng. Enc. L., 107; High on Ex. Rem., § 30b.

Wishek & Guy and *Herreid & Williamson,* for respondent.

When there are sixty schools in a county the law imperatively commands an appropriation. The commissioners have no discretion, they must act upon existing facts. *Roberts* v. *U. S.,* 20 Sup. Ct. Rep. 376. A demand was not a conditional prerequisite, the law commanded the commissioners to make the appropriation. Section 652, Rev. Codes; *Heintz* v. *Moulton,* 64 N. W. Rep. 135.

YOUNG, J. The defendants who constitute the board of county commissioners of McIntosh county, appeal from a judgment of the district court of said county awarding a peremptory writ of mandamus commanding them, as such board, to appropriate from the general fund of said county and pay to the relator the sum of $692 as and for money expended by him for clerical assistance in the office of county superintendent of schools of said county. The relator bases his right to such appropriation and payment upon the following provision contained in § 652, Rev. Codes 1899: * * * In counties having sixty schools the board of county commissioners shall appropriate $100 for clerical assistance in the county superintendent's office, and $5 for each additional school, to be paid monthly. * * *" This proceeding was instituted by the relator on January 7, 1901,—the day upon which his term of office as county superintendent expired. His affidavit, the allegations of which are embodied in the alternative writ, in substance states as grounds for relief that during the years 1897, 1898, 1899, and 1900 he was the duly elected, qualified, and acting county superintendent of schools in and for McIntosh county; that the defendants constitute the board of county commissioners for said county; that during the years above named there were in said county the following number of schools under the official supervision of the relator, to-wit: In 1897, 71 schools; in 1898, 72 schools; in 1899, 78 schools; in 1900, 83 schools; that the defendants have failed, refused, and neglected to appropriate any sum of money whatever for clerical assistance in the county superintendnt's office of said county during any of said time; that the amount required by law to be appropriated during said period was $717; that during said period relator had clerical assistance in his office; that, by reason of defendants' failure and neglect to make the appropriation therefor, the relator was compelled to, and did, pay for such clerical assistance from his individual funds. In answer to the allegations of the alternative writ, the defendants deny that there were during the years in question the number of schools alleged by the relator, and deny that there were during said years 60 schools or more in said county in which school was taught for three months or more, or at

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all. They also deny that relator needed any clerical assistance in his office during said period. They further deny that he employed any clerical assistance in said office, or had paid any sum whatever for such assistance; and they allege that at no time during said period did the relator advise defendants that clerical assistance was required in said office, or that he was entitled to the same by reason of the number of schools in said county. The answer further alleged that on the 7th day of January, 1901, the relator filed with the county auditor of McIntosh county a demand for the identical appropriation which he seeks to obtain in this proceeding; that before an opportunity was given to act upon said demand the relator commenced this action; that no evidence was presented to the defendants in support of said demand, and that on the 25th day of January, 1901, the same was rejected by the defendants; that on the 23d day of February, 1901, the relator duly appealed to the district court of McIntosh county from the decision of the defendants rejecting said demand, said appeal is now of record and still pending before said court, involving the identical claim which is involved in this proceeding. The answer further alleges that during the years named the relator was engaged in private business other than the discharge of his official duties as superintendent of schools, and that whatever clerical assistance had been employed by him during said years was employed by reason of such other business. A jury was impaneled to try the issues made by the alternative writ and the defendants' answer. After a portion of the testimony was introduced, by stipulation of counsel the jury was discharged. After the introduction of further testimony the case was submitted to the court for determination. The trial court found the facts to be substantially as set out in the alternative writ, and, as a conclusion of law, found that the relator was entitled to a peremptory writ of mandamus requiring and commanding the defendants to forthwith appropriate and pay to the relator the sum $692 for clerical assistance, and to a judgment for his costs and disbursements. From the judgment entered in accordance therewith the defendants have appealed to this court, and in a settled statement of the case, purporting to include all of the evidence offered at the trial and proceedings had, have demanded a retrial and review in this court of the entire case. The statement also contains specifications of 16 alleged errors, 10 of which are based upon rulings on the admission of evidence, 4 upon certain orders, 1 upon the court's conclusions of law, and 1 upon the insufficiency of the evidence to sustain the findings.

A motion was presented by counsel for respondent to affirm the judgment in his favor upon the ground that the statement of the case, wherein the appellants have demanded a retrial and review of the entire case in this court, does not contain all of the evidence offered. An examination of the statement makes it evident that it was settled with a view to securing a retrial of the entire case under § 5630, Rev. Codes 1899. It contains the statutory demand for a re-

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trial, and attached to the statement is the certificate of the trial judge to the effect that it contains all of the evidence offered at the trial. We find, however, that a large amount of testimony, both oral and documentary, has been entirely omitted from the statement. Upon this state of facts, under the repeated decisions of this court, we are without authority to accord to appellants the review and retrial which they demand. Not only are we unable to accord a retrial, but we are also unable to review the errors specified in the statement which relate to the elicitation of evidence. Upon appeals taken under § 5630 Rev. Codes 1899, this court does not sit for the correction of errors. On the contrary we are required to try the case anew on all the evidence offered, and objections to evidence can only be considered in connection with a new trial of the facts. *Shepard* v. *Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089; *Erickson* v. *Bank*, 9 N. D. 81, 81 N. W. Rep. 46. Whether any of the other errors specified are reviewable, we need not determine. It is a debatable question whether a mandamus proceeding comes under the provisions of § 5630, as to the manner of trial and appeal. *Mooney* v. *Donovan*, 9 N. D. 93, 81 N. W. Rep. 50. Both parties have assumed that it was governed by the provisions of said section, which, in terms, at least, relate to the trial of civil actions tried to the court without a jury. The question not being urged, we express no opinion upon that point, but reserve the same for future determination, when we shall have the aid of counsel, and shall assume, for the purposes of this decision, that the proceeding was triable under said section. Notwithstanding the fact that the statement is defective and insufficient in the particulars urged by counsel for respondent in their motion, yet we are unable to grant their motion to affirm the judgment.

We still have before us the judgment roll proper, after eliminating from consideration the defective statement. Error is predicated thereon, and the same is presented to us for review by a proper assignment in appellants' brief. The single error assigned upon the statutory judgment roll is that "the conclusion of law and judgment are not justified by the findings of fact." The conclusion of law made by the trial court which is assailed by this assignment of error is that the relator is entitled to a peremptory writ of mandamus requiring the defendants to appropriate and pay to him the sum of money in question as and for clerical assistance in the county superintendent's office during the years named. The question presented is whether the facts found authorize this conclusion. We are of opinion that they do not. Briefly stated, the facts upon which the judgment rests are that during relator's term of office there were a sufficient number of schools under his supervision to authorize and require the county commissioners to make an appropriation for clerical assistance in his office in the sum of $692; that defendants did not make such appropriation; that the relator had clerical assistance in his office, and paid for such clerical assistance from his own funds, and payment therefor has not been made by the county either to the

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person rendering the service or to the relator. It is urged by counsel for appellants that, upon the facts of this case, the remedy by mandamus was not available to the relator as a means of securing the relief demanded. The condition of the record, as we have seen, precludes an examination of the evidence, and the findings do not present the facts which appellants rely upon to defeat the remedy here invoked. Our views upon that question will be found in *State* v. *Albright*, 11 N. D. 22, 88 N. W. Rep. 729.

It is also urged that, even if the remedy by mandamus was proper, it was abandoned by the relator by appealing to the district court from the action of the county commissioners rejecting his claim; and it is also urged that, in the absence of a previous appropriation for clerical assistance, the employment of clerks in his office was without authority of law, and created no legal obligation against the county. On these propositions we find it unnecessary to express an opinion. We base our conclusion upon the broad ground that the facts found and previously stated do not establish a legal obligation in relator's favor against the county. In other words, we are of opinion that, had the facts here found been established in an ordinary civil action, a judgment against the county in relator's favor could not be sustained. In this view, the question as to remedy is unimportant. The relief which the relator seeks in this proceeding, and which is awarded to him by the judgment apealed from, is the recovery of the sum $692. It is patent that this recovery can be sustained only upon the ground that the county owes a legal obligation to pay the relator said sum. The grounds upon which counsel for relator seek to sustain the recovery are not clear. It would seem, however, to be their contention that the statute which requires county commissioners to appropriate moneys for clerical assistance in the superintendent's office when there are the requisite number of schools also requires that such moneys be paid directly to the superintendent, to be expended by him in his discretion; in other words, that he is made the custodian of the funds so appropriated, and is vested with authority to disburse the same, and also with authority to audit and allow or reject accounts of persons rendering clerical assistance in his office. We find no language in the statute which will warrant this interpretation. It is true, under the section referred to, county commissioners are required to make an appropriation for clerical assistance for county superintendent's offices when there are the necessary number of schools. It is not a matter of discretion with them, as in the case of clerks and deputies for county auditors, registers of deeds, treasurers, county judges, and clerks of district courts. See § § 2063, 2069, 2074, 2078, 2081, Rev. Codes 1899. The fact, however, that the county commissioners are required to make the appropriation for clerical assistance does not authorize the inference that it is to be paid to the superintendent, and that he, instead of the county treasurer, is made the custodian of the funds, or that he, instead of the county commissioners, is to audit and allow the ac-

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counts for clerical assistance. The appropriation is to pay for clerical assistance, and is to be paid monthly. It is not to compensate the superintendent for services. His salary is provided for elsewhere in the same section. When clerks are lawfully enployed in his office, the legal obligation to pay them for the services rests not upon the superintendent, but upon the county, and the same is to be paid from the funds appropriated for that purpose. The demands of clerks so employed are not fixed by law, and could not, therefore, be audited and paid by the county auditor, as in the case of salaries. Section 1974, Rev. Codes 1899. The board of county commissioners have the general superintendence of the fiscal affairs of the county, and constitute a board of audit for all claims and demands against their counties, the amounts of which are not fixed by law. Sections 1907, 2626-2630, Rev. Codes 1899. Such accounts are paid upon warrants signed by the chairman of the board of county commissioners, and attested by the county auditor (§ § 1899, 1974, Rev. Codes 1899), and not upon warrants issued by the county auditor, as in the case of salaries. It would require plain language to warrant the conclusion that the legislature intended to except claims for clerk hire in the office of county superintendents from the general provisions governing the auditing of claims against counties and the disbursement of county funds. No such language is contained in the statute in question, or language from which such an interpretation can be inferred. It is apparent, therefore, that the fact that there were a sufficient number of schools to require an appropriation for clerk hire, and that clerks were employed in the relator's office during said period, and that the county has not paid them for their services, does not establish an obligation on the part of the county to pay the relator. The obligation of the county, if clerks were lawfully employed, is to pay such clerks for their services. That obligation, if it ever existed, still exists, and payment to the relator would not discharge such obligation. The relator claims that he has discharged the obligation of another; that is, by paying the clerk from his own funds he has relieved the county from making such payments. The exact reverse is true. He was not the agent of the county in making the payments. His acts were not authorized by law. They were the acts of a stranger. The law is well settled that "payment by a stranger, between whom and the defendant there is no privity, cannot be pleaded by the latter in bar of a suit for his own debt." *Bleakley* v. *White*, 4 Paige, 654; *Atlantic Dock Co.* v. *Mayor, etc., of New York*, 53 N. Y. 64; *Muller* v. *Eno*, 14 N. Y. 605; *Daniels* v. *Hallenbeck*, 19 Wend. 407; *Clow* v. *Borst*, 6 Johns. 36; *Goldstein* v. *Smiley*, 168 Ill. 438, 48 N. E. Rep. 203. As has been said, whatever legal obligation arose against the county through the employment of clerks in the relator's office was due to the clerks so employed. It appears from the findings that these obligations have not been discharged, and are still enforceable demands against the county. The relator was not

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authorized to make disbursments on behalf of the county. Upon the facts found, the county's liability is to the clerks, and to permit the plaintiff to recover would be to subject the county to a double liability. This cannot be permitted, and is not warranted by any legal principle with which we are familiar.

It follows from what we have said that the trial court erred in awarding the relator the peremptory writ. The judgment of the district court is reversed. The appellants will not be permitted to recover the costs of printing the abortive statement of the case. They will be allowed for 20 pages of the printed abstract, and no more. All concur.

88 N. W. Rep. 734.

PETER J. MCCLORY *vs.* B. S. RICKS, *et al.*

Ejectment—Evidence—Pleading.

This action is brought to recover the possession of land. The complaint alleges that the plaintiff owns the land in fee simple, and that the defendants unlawfully entered upon the land, and wrongfully withhold the possession from the plaintiff. Defendants answer jointly, and deny that plaintiff owns the land, and allege that the defendant B. S. Ricks owns the land in fee, and that the defendant Olson holds under Ricks. The answer alleges as a defense no equitable title or right whatsoever. At the trial evidence was offered by the defendants which was pertinent to the defense of title as alleged in Ricks, and said evidence was not in terms offered for any particular purpose. *Held*, that said evidence could not be resorted to by the defense to sustain an equitable right of possession not pleaded in the answer.

Illegal Foreclosure of Mortgage—Possession.

Under the statutes of this state governing mortgages of realty a mortgage conveys no title or estate in the land. Nor does such mortgage, either before or after condition broken, give the mortgagee or his assigns a right to the possession of the mortgaged premises, without the consent of the mortgagor, until after a lawful foreclosure is perfected. Accordingly, *held*, that the defendants, who took possession of the plaintiff's land without his consent, either express or implied, and did so under color of a mortgage foreclosure proceeding by advertisement, which was illegal and wholly void, were unlawfully in possession of the land.

Right to Maintain Ejectment.

Held, further, that the plaintiff, who gave the mortgage, and who is the owner of the land, can maintain an action to eject the defendants from their unlawful possession, and do so without paying the mortgage debt.

Judgment for Plaintiff.

Held, further, that the judgment dismissing the action must be reversed, and judgment entered for the plaintiff.

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Appeal from District Court, Ramsey County, *Morgan,* J.

Action by Peter J. McClory against B. S. Ricks and Ole Olson. Judgment for defendants, and plaintiff appeals. Reversed.

M. H. Brennan, for appellant.

Siver Serumgard, (*Cochrane & Corliss,* of counsel), for respondents.

WALLIN, C. J. This action was tried without a jury, and the trial court entered judgment dismissing the action. The plaintiff has appealed from such judgment, and a trial of the entire case anew is demanded in the statement of the case. The action is in the nature of an action of ejectment, and is brought to recover the possession of a quarter section of land described in the complaint and situated in the county of Ramsey, N. D. The complaint alleges that the plaintiff on the 30th day of March, 1896, was seized in fee of the land in question and was then in possession thereof, and entitled to the possession; that later, and on the 19th day of October, 1896, and while the plaintiff was seized of the title and in possession of the land, the defendants without right or authority of law, entered into the possession of said premises, and ousted the plaintiff therefrom, and that the defendants now unlawfully withhold possession thereof from the plaintiff. Judgment for the delivery of the possession to plaintiff, with costs, is demanded. Defendants answer jointly, and deny each and every allegation of the complaint, and allege that the defendant B. S .Ricks is the owner of the land in fee simple, and was such owner when the action was commenced and on the 19th day of October, 1896, and that said defendant Ole L. Olson was at said date and long prior thereto in possession of the land with the consent of said defendant B. S. Ricks. Said answer of the defendants also pleads and sets out the source of their alleged title in fee, but, inasmuch as the defendants' counsel do not contend in this court that their alleged claim of title in fee is sustained by the evidence offered at the trial, it will be unnecessary, in deciding the case, to do more than briefly mention the foundation upon which the defendants have based their defense of title in fee in the defendant Ricks. It appears that the plaintiff was on and prior to August 4, 1884, the owner of the land, and that on that day, and to secure the payment of a note of $350 due November 1, 1889, to one Eben D. Whitcomb, the plaintiff executed and delivered to said Whitcomb his certain mortgage upon the land in suit. The mortgage contained the usual power of sale on default, but did not contain a stipulation that the mortgagee could take possession of the land before foreclosure of the mortgage. The plaintiff made default in the payment of interest, and pursuant to the power contained in the mortgage the mortgage was attempted to be foreclosed by advertisement under the statute, and pursuant thereto a pretended foreclosure sale of the land was made on May 26, 1886. There was no redemption

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from said sale, and on the 29th day of October, 1887, a sheriff's deed, based upon said sale, was delivered to Eben D. Whitcomb, the morgagee, who was the purchaser at the sale. It is conceded that said attempted foreclosure was irregular and void, and that the purchaser acquired no title to the land by the attempted foreclosure or by the sheriff's deed. But it further appears that said Eben D. Whitcomb, by deed of warranty executed and delivered by him on September 14, 1895, attempted to convey said land to one Albert M. Powell, which deed was regularly recorded. It further appears that on the 29th day of October, 1895, the said Albert M. Powell, by an instrument in writing agreed to sell said land to the defendant Ole L. Olson, and that Olson took possession of the land under said agreement. Later, and on August 25, 1896, Powell, by a deed of warranty executed and delivered by him, conveyed or attempted to convey the land to the defendant B. S. Ricks, said conveyance being made subject to the rights acquired by said Olson by said agreement in writing previously made with said Albert M. Powell as above stated. The record discloses the further fact that two tax deeds describing the land,—one made by the county auditor of Ramsey county, and one made by the county treasurer of Ramsey county,—were put in evidence to sustain the defendants' allegation of ownership of the land in fee simple, but it is conceded that the assessments of the land upon which the deeds are based were respectively illegal and void, and that the tax deeds therefore do not operate to convey any title or interest in the land to the defendants, or to either of them. This narrative of the uncontroverted facts in the record will suffice to show that neither of the defendants is seized of a fee title to the land, and, as has been said, counsel for the defendants do not claim in this court that the allegations of a fee title in the defendant Ricks as pleaded in the answer are sustained by the evidence. The plaintiff's title in fee at the time of the execution and delivery of the mortgage is established by the evidence, and is not disputed upon the facts in this record; therefore we have no difficulty in reaching the conclusion that the plaintiff is now the owner of the land in fee simple, and that the plaintiff was such owner at the commencement of the action. The evidence shows that Powell, on receiving his deed from the mortgagee, took possession, and that about one month later he contracted to sell the land to the defendant Olson. The contract of sale to Olson was made in October, 1895, and upon its execution Olson took possession of the premises, and was in possession thereof under said contract when the action was commenced. But the undisputed evidence shows that plaintiff informed Olson before his purchase from Powell that he (the plaintiff) was the owner of the land. The undisputed evidence further shows that in October, 1895, and soon after Olson entered into posesssion, the plaintiff saw Olson, and informed him that he (Olson) was a trespasser on the land. Plaintiff testifies positively that he never at any time or in any manner consented to Olson's possession and never surrendered possession

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or gave possession to either or any of the defendants. Nor is this evidence disputed. The evidence further shows that the mortgagee, Whitcomb, never personally took possession of the land, and there is neither allegation nor proof that Whitcomb was ever in possession, or that he assumed to transfer any actual possession to his grantee, Albert M. Powell, or to any other person.

Upon this state of facts the trial court found as a conclusion of law that the action should be dismissed, and a judgment of dismissal was entered. The findings, however, do not show that the court found as a conclusion of law upon the facts or the evidence that the defendant Ricks was the owner of the land. Nor could any such conclusion of law be sustained. The trial court, however, found as a fact that after the execution of the mortgage the plaintiff neglected to pay any taxes on the land, and that plaintiff had not, when the action commenced, paid the debt secured by the mortgage, except one installment of interest. The trial court further found that after the year 1887 the plaintiff had performed no acts of ownership as to the premises except to visit the land occasionally when in the vicinity. These findings are supported by the evidence, and, while the fact is not so stated in the findings of the court below, we must infer that the trial court based its legal conclusion that the plaintiff could not recover upon the said findings of fact.

In this court the respondents' counsel rest the defendants' alleged right of possession exclusively upon the legal theory that the defendants are in the position of a mortgagee in peaceable and lawful posesssion, and this assumption rests upon the proposition that the defendants who hold under the mortgagee—who was the purchaser at said void foreclosure sale—are entitled to be subrogated to the rights of a mortgagee in possession. Hence our further inquiries must have reference to the respondents' theory that defendants are entitled to the rights of a mortgagee in possession. As to this we remark, first, that this theory has no foundation either in the pleadings or in the evidence offered at the trial. By their pleadings the parties respectively have based their alleged right of possession upon a fee-simple title, and upon that only. There is neither an averment of fact nor a suggestion in the pleadings of any right to possession based upon any equity whatsoever. Nor is there an averment in the answer that the defendants have taken possession of the plaintiff's land by the plaintiff's consent or permission. On the contrary, all of the averments in the answer and all the evidence in the case clearly point to the conclusion that the defendants took possession of the land under a claim of absolute title and ownership based upon the sheriff's deed and the deeds made by Whitcomb and Albert M. Powell. No claim is made that the deed from Whitcomb undertook on its face to do more than convey the title of the land with the usual covenants; nor is it alleged that Whitcomb at any time actually transferred the note or mortgage to any person, or the debt secured thereby. It therefore appears that the defense in this court is some-

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thing widely different from that which was originally set up as grounds of defense. The defense pleaded was strictly a legal defense, and that urged in this court is strictly an equitable defense, and one not pleaded. Under the statute a defendant is at liberty to set out by answer as many defenses as he has, whether the same are legal or equitable; but it is elementary that any substantial defense must be pleaded in order to furnish a ground of relief. This is strictly true in pleading a title or an equitable interest in real estate as a defense to an action at law to recover possession. See *Estrada* v. *Murphy,* 19 Cal. 248; *Kentfield* v. *Hayes,* 57 Cal. 409; *Cadiz* v. *Majors,* 33 Cal. 288; *McCauley* v. *Fulton,* 44 Cal. 355; *Williams* v. *Murphy,* 21 Minn. 534; *Powers* v. *Armstrong,* 36 Ohio St. 357. Under this rule, which is an elementary rule of pleading, we are of the opinion that the defendants are not in a position to claim the benefit of the equitable defense which they are now attempting to claim. Had this defense been pleaded, the plaintiff would have had an opportunity at the trial to show any fact tending to disprove the present claim of the defendants. The plaintiff could have shown, if such is the fact, that the note and mortgage was never turned over to Albert M. Powell, and that by an express agreement the same were retained by the mortgagee, to be disposed of by him, or to be made the basis of a future foreclosure. If such is the fact, the defendants would be permitted to show that Albert M. Powell well knew, when he received the deed from Whitcomb, that the foreclosure was void, and that no title passed under the deed; or show that Powell paid nothing for the land. Under such a state of facts Powell would not be in a position to claim that he took possession in good faith under a foreclosure sale. See *Jackson* v. *Bronson,* 19 Johns. 325. But there was no such issue tendered by the answer, and hence the plaintiff could not and did not offer evidence upon any such issue. The evidence actually offered, while insufficient to show title in the defendants, was nevertheless strictly pertinent upon the issue of title; and was not, so far as the record shows, offered for any other or different purpose. We are therefore of the opinion that the equitable defense sought to be interposed in this court by the defendants is not available to them as a defense against the plaintiff's right of possession, which right rests upon a legal title.

This conclusion will necessitate a reversal of the judgment, but this court would reach the same result upon other grounds, which are based upon the statute, and upon the established rules of law in this and in many other states governing the rights of mortgagors and mortgagees with respect to the possession of real estate incumbered by mortgage. It is needless to say that the common-law mortgage never has had an existence either in this state or in the territory of Dakota. At common law the mortgage conveyed the fee, and the mortgagee after default was entitled to the possession, and, having the fee, could maintain ejectment against the mortgagor. Under the statute in this state a mortgage conveys no estate in the

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land of any degree or quality. It is a mere lien, given as security, and is of such a nature that it confers no right of possession either before or after default. Nor can possession be taken under a mortgage of real estate until a lawful foreclosure is completed. Section 4714, Rev. Codes, reads as follows: "A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of a mortgage the mortgagor may agree to such change of possession without a new consideration." It is clear that this statute in terms precludes a mortgagee from taking possession of the land before foreclosure under the mortgage unless a clause inserted in the mortgage expressly permits him to do so. Similar statutes are found in many of the states, and the adjudications under such statutes are numerous and uniformly to the effect that the mortgage itself confers no right of possession either before or after default. *Hall* v. *Savill*, 3 G. Greene, 37, 54 Am. Dec. 485; *Wagar* v. *Stone*, 36 Mich. 364; *Kopke* v. *People*, 43 Mich. 45, 4 N. W. Rep. 551; *Morse* v. *Byam*, (Mich.) 22 N. W. Rep. 54; *Rice* v. *Railroad Co.*, 24 Minn. 464; *Newton* v. *McKay*, 30 Mich. 380; *Humphrey* v. *Hurd*, 29 Mich. 44; *Hazeltine* v. *Granger*, 44 Mich. 503, 7 N. W. Rep. 74; *Rogers* v. *Benton*, (Minn.) 38 N. W. Rep. 765, 12 Am. St. Rep. 613; *Willis* v. *Moore*, 59 Tex. 628, 46 Am. Rep. 284; *Spect* v. *Spect*, 88 Cal. 437, 26 Pac. Rep. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314. But it must be conceded that even in states having statutes similar to our own the courts are divided in their views as to the effect to be given to the act of taking possession of the land in cases where the mortgagee or his assignee has, before foreclosure, taken possession, peaceably, but without the consent of the mortgagor. The courts of Wisconsin, which seem to follow the adjudications in the state of New York, hold that in such cases ejectment does not lie in favor of the owner to eject the occupant, and that the mortgagee, under such conditions, can continue in possession until the debt secured by the mortgage is paid. See *Brinkman* v. *Jones*, 44 Wis. 498, and *Hennesy* v. *Farrell*, 20 Wis. 46. It is probable that the learned trial court followed the rule laid down in the cases last cited. But while we entertain the highest respect for the courts which have enunciated this conclusion, we nevertheless find ourselves unable to accept the same as a sound interpretation of the statutes of this state relating to real estate mortgages. We think the language as well as the logic of the statute demands such a construction by the courts as will secure to the mortgagor the right of possession as against the mortgagee and those claiming under him, and this at all times until title is acquired by a valid foreclosure; this, of course, being subject to the further right of the parties, either by an express stipulation inserted in the mortgage, or by an oral or written agreement subsequently made, to agree that the mortgagee shall have possession before forclosure. Nor can we understand—much less indorse—the reasoning of some courts which declare in one breath that a mortgagee before foreclosure

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because he has no title to the land, cannot maintain ejectment as against the mortgagor, and in the next breath declare that when a mortgagee is once in peaceable possession he cannot be ejected by the mortgagor. As it appears to us, the right to the possession of mortgaged premises under such a rule is not to be determined by legal principles, nor yet by the provisions of any statute, but is, on the contrary, controlled by mere fleetness of foot. In the race for the land the party will get and hold the possession who first reaches the goal, viz., the actual possession of the land.

The views of the courts in the cases next cited meet with our full approval, and we shall rest the decision in this action upon the authority of said cases and the reasoning contained in them. *Rogers* v. *Benton*, (Minn.) 38 N. W. Rep. 765, 12 Am. St. Rep. 613; *Newton* v. *McKay*, 30 Mich. 380; *Galloway* v. *Kerr*, (Tex. Civ. App.) 63 S. W. Rep. 180; *Shimerda* v. *Whohlford*, (S. D.) 82 N. W. Rep. 393; *Johnson* v. *Sandhoff*, 30 Minn. 197, 14 N. W. Rep. 889; *Bowan* v. *Brogan*, (Mich.) 77 N. W. Rep. 942, 75 Am. St. Rep. 387. In *Rogers* v. *Benton*, Judge Mitchell, speaking for the court uses this language: "It follows necessarily from this that a mortgagee, even after condition broken, has no right or remedy except to foreclose his mortgage; that he cannot, merely under his mortgage, either recover or maintain possession of the mortgaged premises. The only logical rule is that to constitute a 'mortgagee in possession' the mortgagee must be in possession by reason of the agreement or the assent of the mortgagor or his assigns that he have possession under the mortgage and because of it." In *Newton* v. *McKay* the court said: "It would be absurd to hold that there could be a right of possession which could not lawfully be enforced." In *Galloway* v. *Kerr* the following language is used: "The possession of the mortgaged premises by the mortgagee, without the consent of the mortgagor or a foreclosure of the mortgage, is wrongful, and it is not necessary for the mortgagor to pay the debt in order to recover possession of the premises." In the case at bar there is neither allegation, truth, nor claim that the mortgagor consented in any manner to the entry upon the premises made by the defendants, nor was there a stipulation in the mortgage giving the mortgagee a right to take possession before foreclosure. Nor have we overlooked the case of *Backus* v. *Burke*, (Minn.) 65 N. W. Rep. 459.

Our conclusion is that the judgment appealed from must be reversed, and the trial court will be directed to reverse the judgment, and enter judgment for the plaintiff as demanded in his complaint. All the judges concurring.

FISK, District Judge. I concur in the foregoing opinion as to the last proposition therein contained, but I express no opinion either way as to the question of pleading, as this question was not raised by counsel, and its determination is not necessary to a decision of the case.

MORGAN, J., having acted as the trial judge in the above action,

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took no part in the above decision; Judge C. J. FISK, of the First judicial district, sitting in his place by request.

88 N. W. Rep. 1043.

ALEXANDRINA FINLAYSON *vs.* PETER C. PETERSON

Quieting Title—Pleading—Amendment.

This action involves the title and right of possession of a quarter section of land. The original complaint alleged title in the plaintiff, and that the defendant entered upon the land unlawfully, and unlawfully withheld the possession from the plaintiff. Said complaint further alleged that an attempt had been made to foreclose a certain mortgage upon the land, and that a pretended sale and pretended sheriff's deed had been made and executed pursuant to such foreclosure proceeding, and that said sheriff's deed had been recorded, and further, that the purchaser at such foreclosure sale had attempted to convey said land to the defendant by a deed of warranty, which deed had been recorded. Said complaint also set out facts showing that said attempted foreclosure proceeding was illegal and wholly void. By said complaint the following relief was asked: First, that title be quieted in the plaintiff; second, that plaintiff recover possession of the land, with damages for the value of the use; third, that said foreclosure proceeding, including the sheriff's deed, be adjudged illegal and void, and that said deed and the purchaser's deed to the defendant be annulled and cancelled of record. Subsequently, and after, on appeal to this court, it was adjudged that said foreclosure proceeding was illegal and wholly abortive, the plaintiff filed an amended complaint in the district court, in which the allegation in the original complaint to the effect that the defendant took possession and held possession of the land unlawfully was omitted and in lieu thereof it was alleged that defendant took possession under his mortgage, and had continued to farm the land as a mortgagee for 11 years; and upon this allegation the plaintiff demanded as relief an accounting in lieu of the value of the use previously asked for, and the plaintiff further asked for the possession of the land, and that said before-mentioned clouds upon his title should be removed, and that the title be quieted in plaintiff, and for several relief in equity. Defendant moved in the district court to strike out the amended complaint upon the ground that the same set out a different claim and cause of action from that pleaded in the first complaint. This motion was denied. *Held*, for reasons stated in the opinion, that such ruling was proper. The claim and cause of action alleged in the amended complaint, as well as the relief sought, was in its general scope the same as in the first complaint and the relief sought in both was equitable relief; and none the less so because the plaintiff, with other relief, asks the possession of the land, and compensation in money for its use.

Tax Deeds—Estoppel from Claiming Under.

The mortgage, in terms, permitted the mortgagee to pay the taxes assessed against the land, and add the amount so paid to his claim. This was not done, but before the attempted fore-

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closure the mortgagee obtained two tax deeds of the land, and the alleged title obtained by the tax deeds was conveyed to the defendant. A third tax deed was obtained by the defendant while he occupied the land as grantee of the purchaser at the foreclosure sale. *Held*, for reasons stated in the opinion, said two first mentioned tax deeds were void and conveyed no title; and *held*, further, that all of said tax deeds were obtained by a trustee of the land, and that for this reason the deeds cannot be set up as a title hostile to the plaintiff's title.

Illegal Foreclosure—No Title Thereunder.

Held, that, inasmuch as the foreclosure was illegal, the defendant acquired no title to the land, either by said tax deeds, or by the deed of warranty given him by the purchaser at the foreclosure sale.

Possession by Mortgagee.

Defendant took possession of the land in 1888, and continuously cultivated the same until the trial of the action in the fall of 1900. Defendant took possession in good faith and peaceably, believing that he was the owner under said deeds of conveyance, and did not, in taking possession, intend to assume the relation of a mortgagee in possession. The mortgage, in terms, authorized the mortgagee or his assigns to take possession upon default, and thereafter account to the mortgagor for the rents. It appeared further by defendant's answer that the defendant took possession of the land with the knowledge and acquiescence of the mortgagor. *Held*, upon this state of facts, that the mortgagee's possession, under the law was that of a trustee, and that he could be required to account and to surrender possession to plaintiff after the net rents, issues, and profits of the premises had discharged the debt and all lawful taxes paid by the defendant with interest.

Purchaser at Sale—Subrogation.

The defendant acquired title to the note and mortgage, and the same were transferred to him, and in his possession at the trial. *Held*, that the defendant had all the rights of the mortgagee, both by said transfer, and by reason of being subrogated to the rights of the mortgagee, which rights were acquired by the purchaser at the abortive foreclosure sale.

Ejectment—Condition Precedent to Action.

Held, further, that said defendant, having taken possession peaceably and by the express consent of the mortgagor, and by her knowledge and acquiescence, could not be ejected from the land in any form of action until his debt and other just claims for taxes were paid.

Accounting.

The accounting and the judgment of the district court having been examined and found to be just and equitable, the same are in all things affirmed.

Appeal from District Court, Grand Forks County, *Morgan*, J.

Action by Alexandrina Finlayson against Peter C. Peterson. Judgment for plaintiff, and defendant appeals. Affirmed.

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Bosard & Bosard, for appellant.

W. H. Standish and *George A. Bangs,* for respondent.

WALLIN, C. J. This action was commenced in October, 1893. In the original complaint it was alleged, in substance, that the plaintiff is the owner in fee of the quarter section of land described in the complaint; that the defendant on the 13th day of November, 1888, unlawfully took possession of the land, and unlawfully withholds the possession from the plaintiff; that the rents, issues, and profits of the land during the period of defendant's unlawful occupancy thereof were of the value of $2,000. Said complaint further alleged that the defendant claimed to be the owner of the land under a certain deed of warranty executed and delivered to him by one James Milne on the 30th day of October, 1888, which deed was properly recorded, but it is alleged that said James Milne, when said deed was made and delivered to defendant, had no legal right to convey the land, and had no title thereto; that the pretended right to convey of said James Milne was based upon an attempted mortgage foreclosure sale of the land made on the 25th day of January, 1886, and pursuant to which sale a sheriff's deed, dated November 22, 1888, was executed and delivered to Milne, and subsequently recorded; and that said attempted foreclosure sale was made by advertisement under a mortgage covering said land, which was executed and delivered on November 27, 1882, by the plaintiff and her husband, one Donald Finlayson, and which was given to secure the payment of a promissory note for $1,000, becoming due November 1, 1887, with interest payable annually, which note and mortgage were given to one Robert S. Gurd to secure a debt due to the said Gurd. The complaint further stated, in effect, that said foreclosure proceedings, including the sheriff's deed, were illegal and wholly void because the notice of the sale was not published a period of 42 days prior to the date of sale, but that said proceedings, including the deed, being of record, were a cloud upon the plaintiff's title to the land in suit. By said complaint the plaintiff prayed for relief as follows: For the recovery of the possession of the land, together with $2,000 as and for the value of the use thereof; that the court should by its judgment declare that the defendant had no right or title to the land, and that the plaintiff is the absolute owner thereof; that the said sheriff's deed to James Milne, and said deed of warranty from Milne to the defendant, be adjudged to be illegal and void; and that the same be canceled of record. To these specific prayers for relief there was added a general prayer for relief in equity, and for plaintiff's costs and disbursements. To this complaint a general demurrer was interposed for insufficiency, and the district court sustained the demurrer. On appeal to this court the order sustaining the demurrer was overruled, and the case was in June, 1896, remanded for further proceedings. See *Finlayson* v. *Peterson,* 5 N. D. 587, 67 N. W. Rep. 953, 33 L. R. A. 532, 57 Am. St. Rep. 584. On September 28, 1897, an amended

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complaint was filed in the district court, which, in substance, embraced all the allegations of the first complaint, but omitted the allegation that the defendant unlawfully entered upon the land and ousted the plaintiff thereof. In the amended complaint the following facts not contained in the first complaint were, in substance, set out, viz.: That the supreme court had decided that the attempted foreclosure was abortive, and that it would follow from such adjudication that the two deeds based on the foreclosure conveyed no title to the defendant, save and except as, in equity, they operated as an equitable transfer of the mortgage and mortgage debt and taxes paid by the defendant. This new complaint further alleged that the defendant, since taking possession of the land had leased the same to one Allison for a period of five years, viz., from 1890 to 1894, inclusive, and as and for a rental the defendant had received one-half share of the crops produced on the land during said rental period; that the plaintiff was unable to ascertain the precise aggregate value of said rental received by the defendant; that during the rest of said period of defendants' occupancy of the land, which began in 1888, and had continued until the date of filing the amended complaint, the defendant had cropped the land in person; that plaintiff was unable to state the exact value of the use of the land while defendant was cropping the same, but plaintiff alleged, on information and belief, that it was of the annual value of $400 during such period of time; that, inasmuch as the plaintiff was unable to state definitely the rents and profits arising from the land while in defendant's possession, the plaintiff asked that the defendant account for the same, and also show the amount of taxes which had been paid by the defendant and those under whom the defendant claimed. It was further averred that the rents, issues, and profits arising from the land had much more than met and discharged the mortgage debt and the taxes upon the land, and that there was a large sum due the plaintiff from defendant after discharging said incumbrance upon the land and the taxes. In this complaint the plaintiff asked for an accounting in equity, and that a judgment be entered fixing the balance as between the plaintiff and the defendant, and that, if it so eventuated, the plaintiff would pay any sum found to be due upon the mortgage indebtdness, and if, on the other hand, it was adjudged that the defendant was indebted to the plaintiff, that she have judgment against defendant for the amount thereof, and for such other relief as was just.

The defendant moved to strike the amended complaint from the files "upon the ground that the same set forth an entirely different cause of action from that contained in the original complaint." In support of this motion, counsel contended that the original complaint stated a cause of action in ejectment, and that the amended complaint alleged a cause of action for an accounting in a court of equity; and counsel contend, under an established rule of practice existing in the code states, as well as in the states having no code of civil procedure, that this is not permissible. There is good au-

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thority for this proposition of law, and we shall, at least for the purposes of this case, assume its entire correctness as stated by counsel. We are therefore to consider whether the amended complaint is obnoxious under this rule of practice. We think it is not. It lies within the discretion of the district court, either before or after judgment, to allow an amendment of a pleading in furtherance of justice, if the proffered amendment does not "change substantially the claim or defense." Rev. Codes 1895, § 5297. The question is, therefore, whether the facts averred in the amended complaint do substantially change the plaintiff's claim or cause of action as stated in her original complaint. As this court construes the two pleadings, the plaintiff's claim against the defendant, as presented in the two complaints, is substantially one and the same claim. It is certainly clear that a large and substantial part of the relief which a court of equity could lawfully grant the plaintiff under his first complaint could be granted with equal propriety upon the facts set out in the amended complaint. The facts pleaded in both complaints, if established, would entitle the plaintiff to relief in a court of equity as follows: First, to a decree quieting title in the plaintiff, and excluding the defendant from claiming title to the premises; second, to a decree canceling the foreclosure sale, and the certificate and deed issued pursuant to such sale; third, to a decree canceling the warranty deed from James Milne to the defendant, and, finally, to a judgment awarding the plaintiff the possession of the land. The facts pleaded in both complaints, without doubt, invoke the powers of a court of equity; and, being in a court of equity, that court would retain jurisdiction of the case for all purposes, including that of determining the rights of the parties with respect to the possession of the land, which right under both complaints was squarely in controversy. But the two complaints differ in this: In the first it was alleged, in terms, that the defendant took possession of the premises unlawfully, and ousted the plaintiff therefrom; but this statement was qualified in the first complaint by an averment to the effect that the defendant claimed to be the owner of the land under the foreclosure sale, and the deeds of conveyance executed pursuant to such sale. We think that these two statements, when fairly construed, amount only to the allegation that the defendant entered upon the land in good faith as owner, but that he was mistaken as to his ownership, because the foreclosure under which he claimed title was illegal and abortive. It was not alleged in the first complaint that the defendant obtained possession by force, nor is it claimed in any of the plaintiff's pleadings that defendant obtained possession otherwise than peaceably. In the second complaint the allegation that the defendant entered unlawfully and ousted the plaintiff is omitted, and in lieu thereof the plaintiff alleges only that the defendant was in possession of the premises; and by this complaint the defendant did not

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attempt to characterize the defendant's possession, or attempt to allege, in terms, whether the same was or was not lawful or wrongful; but, on the other hand, after stating the facts, the plaintiff prayed for an accounting, and for general relief in equity.

Thus far no substantial difference is developed as between the two complaints, except in this: in the the first complaint the plaintiff asks for damages for the value of the use in the sum of $2,000, while in the amended pleading the claim for damages is dropped, and a claim for an accounting for the net value of the use is substituted. But it seems clear to us that this feature of the relief asked in the second pleading differs only in form and in name from that denominated "value of the use" in the first complaint. In both complaints the plaintiff demanded of defendant a money compensation for the use of her land while occupied by the defendant. Our conclusion is, therefore, that the trial court properly denied the defendant's motion to strike out the amended complaint. The allowance of the amendment was in furtherance of justice, and moreover, by filing the amended complaint the plaintiff made a valuable concession to the defendant, in this: that, upon the facts stated in the amended complaint, it was conceded by plaintiff that the net value of the use, as ascertained upon the accounting asked for, should be credited upon the mortgage debt then owed by the defendant to plaintiff. This equitable adjustment of the defendant's claim as a creditor and holder of the mortgage debt was not tendered by the first complaint, and hence the amendment was highly advantageous to the defendant. The following cases will support our conclusions upon the motion: *Homan* v. *Hellman*, 35 Neb. 414, 53 N. W. Rep. 369; *Newman* v. *Association*, 76 Iowa, 56, 40 N. W. Rep. 87, 1 L. R. A. 659, 14 Am. St. Rep. 196; *Emmett Co.* v. *Griffin*, 73 Iowa, 163, 34 N. W. Rep. 792; *Nye* v. *Gribble*, 70 Tex. 458, 8 S. W. Rep. 608; *Steamship Co.* v. *Otis*, 27 Hun. 452. See, also, *Anderson* v. *Bank*, 5 N. D. 80, 64 N. W. Rep. 114.

On the 27th day of October, 1897, the defendant filed his answer to the amended complaint denying the plaintiff's ownership of the land, and alleging that title to the premises vested in himself under the deed executed by James Milne to himself, and that defendant went into possession under said deed on or about the 13th day of November, 1888, and did so without notice or knowledge that the plaintiff had, or claimed to have, title to the land, and further alleged that at the time the defendant went into possession, and for years prior thereto, the said James Milne was in the peaceable and lawful posesssion of the land, and that Milne, when he conveyed the land to the defendant, was the owner in fee thereof, and was vested with a fee title under a quitclaim deed dated the 7th day of November, 1888, which was executed by Robert S. Gurd; that said Gurd was seised under two several tax deeds of the land made by the county treasurer of Grand Forks county and delivered to Gurd—one of said tax deeds bearing date October 3, 1883, and the other October 15, 1883,—which deeds were recorded. The answer further alleges that defend-

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ant not only acquired a title in fee by his said deed from James Milne, but that defendant also acquired title to the note and mortgage described in the complaint. The answer further states that the plaintiff and her husband soon after executing said mortgage abandoned the premises and removed to the dominion of Canada, and that the plaintiff has never paid any taxes on the land, nor any part of the debt—principal or interest—secured by said mortgage; nor has the plaintiff or her husband ever asserted any claim or title to the land since they left the same, in 1883, until this action was commenced, and this despite the fact that plaintiff has had knowledge of the defendant's possession, and has at all times acquiesced therein. The answer further shows that the defendant has paid the taxes on the land for the years 1889, 1890, 1891, 1892, and 1893, and that such payments of taxes were made in the belief that the defendant was the owner of the land. Defendant alleges as a counterclaim that the note and mortgage described in the amended complaint were severally assigned to the defendant, and that the defendant still owned the same, and that there was due and unpaid on said note, with interest, the sum of $3,250.63, which amount, the answer alleged, was due to the defendant. The answer further shows that said Robert S. Gurd, the mortgagee, paid divers sums and amounts of taxes on the land in the years 1883, 1884 and 1888; and it is averred that said taxes were so paid by Robert S. Gurd by reason of his interest in said real estate, and his lien thereon under and by virtue of said mortgage, and for which plaintiff was indebted to the said Gurd; that no part of the taxes has been paid, and that the claim therefor has been duly transferred to the defendant, and that there was then due defendant on account of said taxes the sum of $400; that after defendant had, as he supposed, acquired title to the land, he continued to pay taxes on the land from year to year, and did so believing that he was the owner of the land; and that the taxes paid by the defendant aggregated $238. The answer further states that he plowed and backset the land after his purchase thereof, and did so as the owner, but the value of said improvements was $400. In this answer the defendant asked for relief as follows: That the action be dismissed, and that title to the land be decreed to be in the defendant, and, finally, that the defendant have judgment against the plaintiff on his said several counterclaims.

The record shows that after the amended answer was filed the case slumbered for an additional period of about three years, and until the 16th day of November, 1900, at which date the defendant moved to dismiss the action. The grounds of this motion, briefly expressed, are that the cause of action had been changed from an action in ejectment to an action for an accounting; that in the amended complaint the plaintiff did not allege, in terms, that the defendant held the land in the capacity of a trustee, or that defendant ever accepted any trust in the land; and, finally, that before commencing the action the plaintiff had not demanded any accountig. This motion was denied, whereupon a supplemental complaint was filed, to which the

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defendant answered; but the last-named pleadings do not in any wise change the essential nature of the action, nor do more than enlarge the claim for relief. The supplemental complaint sets out, however, that on the 25th day of September, 1898, the defendant, while in possession of the land as trustee under the mortgage, acquired a tax title of the land from one M. F. Murphy, which was based on a tax sale made in 1894 for taxes for 1893.

Upon the issues thus framed the case was tried without a jury, and upon the 20th day of December, 1900, the trial court filed its findings, directing judgment to be entered in favor of the plaintiff substantially as prayed for in the complaint, whereupon judgment was entered adjudging that the mortgage debt was fully paid out of the net issues and rents of the land while occupied by the defendant, and that after deducting the aggregate of the mortgage debt, with lawful taxes added, there was a balance due plaintiff from said defendant from said issues and rents in the sum of $1,361.31, for which amount, with costs of suit, judgment was entered. The judgment further directed that the mortgage and several deeds, including said tax deeds, should be held void and canceled of record, and that the title should be quieted in the plaintiff, and that possession should be surrendered to the plaintiff. From such judgment the defendant has appealed, and in this court asks for a retrial of all the issues involved.

Upon these pleadings the question is first presented whether the plaintiff or the defendant is vested with title. This question is not difficult of solution. Plaintiff alleges, and defendant also alleges, that plaintiff's husband was vested with legal title when the mortgage in question was executed; and it is shown, and not disputed, that the husband conveyed his interest to plaintiff before this action commenced, and in the year 1884. It further appears that defendant acquired what he supposed was the legal title under a deed of warranty from the purchaser of the land at an attempted foreclosure sale made under said mortgage on the 25th day of January, 1886, which sale was followed by a sheriff's deed. But before the action was tried in the district court on its merits, it had been finally determined by this court that the attempted foreclosure sale was illegal and wholly abortive. See *Finlayson* v. *Peterson,* supra. But it appears that, prior to the execution of said deed of warranty under which defendant claims title, the grantor, James Milne, who purchased at the attempted foreclosure sale, had received from the mortgagee, Robert S. Gurd, a deed of quitclaim of the land, whereby said Gurd had quitclaimed and granted to James Milne all his rights, both legal and equitable, in the land, and had particularly conveyed all the rights which he (Gurd) had acquired under the two tax deeds before mentioned, and which bear date, respectively, on the 3d and 15th days of October, 1883. The question is then presented whether these two tax deeds, or either of them, operated to convey title either to Gurd, Milne, or the defendant. We are entirely clear that they did not, and this for two reasons: First, it appears that the assessments

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on which both of said deeds depend for their validity were illegal and void, in this: that the land was not sufficiently described in the assessor's return. The description was wholly void, under the rule laid down in *Powers* v. *Larabee*, 2 N. D. 141, 49 N. W. Rep. 724, and *Powers* v. *Bowdle*, 3 N. D. 107, 54 N. W. Rep. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511. Hence the tax deed was inoperative as a conveyance. But aside from this fact, the deeds cannot stand as a conveyance in favor of the defendant and against the plaintiff, because when they were obtained by Gurd he was in the relation of a mortgagee, and, as such, was given permission by the terms of the mortgage to pay taxes on the land, and add the amount so paid out to the mortgage debt. It is well established that a mortgagee, under such circumstances, is estopped to acquire title as against the mortgagor. Under such a state of facts, a trust relation arises, in which the mortgagee or his grantee becomes a trustee, and as such is not only debarred from acquiring title himself as against the trustor, but is under an obligation to pay the taxes, as a means of protecting the trust property as against a hostile title. The authorities cited below will fully sustain our conclusions upon this point, and as they have an equal bearing upon the tax title acquired by the defendant of M. F. Murphy by deed from Murphy dated September 15, 1898, we shall make no further reference to the tax titles, and shall rule that they do not operate to convey the title as against the mortgagor. See Cooley Tax'n, pp. 503, 504, and note 1; 15 Am. & Eng. Enc. Law (1st Ed.) p. 820, and note 3; *Ward* v. *Matthews*, 80 Cal. 343, 22 Pac. Rep. 187; *Christy* v. *Fisher*, 58 Cal. 256; *Burchard* v. *Roberts*, 70 Wis. 111, 35 N. W. Rep. 286, 5 Am. St. Rep. 148. We therefore hold that the record shows that the plaintiff has never been devested of her legal title to the land in suit, and that defendant has never been vested with the legal title thereto.

But the conceded fact remains that the defendant bought the land of James Milne, and took possession thereof, supposing himself to be the owner, on October 30, 1888, and has continuously cropped the land from that date, and until the action was tried. We have seen that, while the defendant has taken possession in good faith and peaceably, he cannot justify his possession as owner of the land; and, evidently anticipating this contingency, defendant has pleaded a counterclaim by his answer, whereby it is alleged that defendant has purchased the mortgage and the mortgage debt, and that after the plaintiff removed from the land the defendant took possession thereof with the full knowledge of the plaintiff, and by her acquiescence. This fact is not controverted by the plaintiff either by proof or allegation. The mortgage embraces the following stipulation: "It is further expressly agreed that in the event of any failure to pay said principal or interest notes, or any part thereof, when due and payable, said second party, or his successors or assigns, shall be, and is hereby, authorized to take immediate possession of said property, and to rent the same, and be liable to account to said first parties only for the net profits thereof." It appears in evidence that

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Gurd took possession of the property and rented it to the defendant prior to the foreclosure sale, and also that Milne was in actual possession at and for some years prior to the date of his deed to the defendant. From all of these allegations and facts it conclusively appears that the defendant may well justify his act of taking possession by the terms of the mortgage itself, and also by the acquiescence of the plaintiff in his possession. In support of this possession it is admitted that the defendant is the owner of the debt secured by the mortgage, and that the same, as well as the mortgage, has been transferred to the defendant, together with the claim of his assignors for any lawful taxes paid on the land by them. It is true that defendant took possession in good faith, supposing himself to be the owner; and up to this time defendant, by his counsel, most strenuously objects to being placed in the category of a mortgagee in possession, and especially protests against the plaintiff's contention that the defendant is a trustee of the premises, and in that relation must account for the net rents, issues, and profits arising from the land while occupied by him. But we are decidedly of the opinion that inasmuch as the defendant cannot justify his possession on the ground of ownership, nor at all, except in the relation of a mortgagee taking possession by consent after default and before foreclosure, he should be regarded, under well-established principles of law, as a mortgagee in posession, and, as such, a trustee accountable to the owner for net rents, issues, and profits.

It will readily be seen in this case that the question is not presented whether a mortgagee after default, or upon a sheriff's deed based upon an abortive foreclosure, may, without consent, take peaceable possession of the premises, and maintain such possession as against the mortgagor or his assignees. In the case at bar there is an express consent in the mortgage, and it is, moreover alleged by the defendant, and not disputed, that the defendant took and held possession with plaintiff's knowledge and by her acquiescence. Under such circumstances, the cases, whether based upon the old form of mortgage, or under the modern mortgage, which is a mere lien, and not a conveyance of title, are practically unanimous to the effect that the defendant in possession cannot by any form of action be dispossessed until the mortgage debt is paid. The cases which could be arrayed in support of our conclusion upon this point are very numerous, but we shall cite only a few which have been decided in states where, as in this state, a real estate mortgage is a mere lien for security: *Madison Ave. Baptist Church* v. *Baptist Church in Oliver St.*, 73 N. Y. 82; *Howell* v. *Leavett*, 95 N. Y. 617; *Hubbell* v. *Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Moulton* v. *Leighton*, (C. C.) 33 Fed. Rep. 143; *Bryan* v. *Brasius*, 162 U. S. 416, 16 Sup. Ct. 803, 40 L. Ed. 1022; Id. (Ariz.) 31 Pac. Rep. 519; *Cooke* v. *Cooper*, 18 Or. 132, 7 L. R. A. 273, 17 Am. St. Rep. 709; *Townsend* v. *Thomson*, 139 N. Y. 152, 34 N. E. Rep. 1100; *Johnson* v. *Sandhoff*, 30 Minn. 197, 14 N. W. Rep. 889; *Holton* v. *Bowman*, 32 Minn. 191, 19 N. W. Rep. 734; *Hennesy* v. *Farrell*, 20 Wis. 46; *Brinkman* v.

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Jones, 44 Wis. 498; *Fee* v. *Swingly*, 6 Mont. 59, 13 Pac. Rep. 375; *Spect* v. *Spect*, 88 Cal. 437, 26 Pac. Rep. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314. The case last cited is especially instructive, because the court in that case places a construction upon a section of the Code of California identical in its terms with that embraced in § 4714, Rev. Codes 1899.

As has been said, an accounting was had in the district court whereby it was adjudged that the defendant had, prior to the accounting, received of and from the rents, issues, and profits of the premises, while in his possession, a net amount greatly in excess of the aggregate of the debt secured by the mortgage, principal and interest, together with the amount of the lawful taxes paid by the defendant and his predecessor, with interest on such taxes; and the trial court, in addition to other relief, gave plaintiff a money judgment for such excess. We have given careful consideration to the matter of the accounting, and the evidence in the record relating thereto, but we are satisfied that it will serve no useful purpose in this opinion to enter into a detailed analysis of this feature of the case. We are convinced that the accounting, as an entirety, is not unjust to the defendant; and, if it is faulty in a few particulars, this fact is explained by the failure of the defendant to furnish the trial court detailed information, which, as a trustee, it was his duty to furnish at the accounting. Moreover, it is our opinion that there is no good reason for believing that another accounting, covering a period of 11 or 12 years of farming operations, would lead to a result more in conformity to the principles of justice than that already had. This action has been pending 8 years, and it is time that the plaintiff should be given possession of her freehold. The accounting already had does not include the year 1901, and the disposition of the present action is therefor made without prejudice to the right of the plaintiff to institute an action against the defendant to compel an accounting for that year.

The judgment of the trial court should in all things be affirmed, and it will be so ordered, provided, nevertheless, that the district court, pursuant to a stipulation of counsel filed in this court, is directed to deduct the sum of $300 from the total amount of the money judgment against the defendant as entered in the district court.

YOUNG, J., concurs. MORGAN, J., took no part in the above decision.

(89 N. W. Rep. 855.)

WILLIAM H. ARNETT *vs.* ELMER E. SMITH.

Equitable Issues Interposed to Action at Law.

When an answer interposed in an action at law presents issues which are cognizable only by a court of equity, proper practice

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requires that the equitable issues shall be tried and determined by the court before submitting the common-law issues to the jury.

Contract to Sell Land—Default—Tender.

Where the covenants in a written contract for the sale of real estate are mutual and dependent, the vendor's obligation to convey being dependent upon a cash payment and the execution of notes and a mortgage by the vendee, and time for perfecting title is not made of the essence of the contract, the vendee can place the vendor in default only by tendering performance on his part; and, in the absence of such tender, he is not entitled to rescind the contract and recover back payments made when the contract was executed.

Accord and Satisfaction.

In order to establish the extinction of the obligations of a written contract by an accord and satisfaction, it is not enough to merely show an oral agreement to render satisfaction at a future date. The accord must be executed by a delivery and reception of the thing agreed to be accepted in satisfaction.

Specific Performance.

The defendant, through an equitable defense and counterclaim, seeks to compel the plaintiff to specifically perform his covenants contained in a written contract wherein the plaintiff agreed to purchase and the defendant to sell and convey certain real estate owned by the latter. It is *held*, on the facts stated in the opinion, that the contract was not rescinded by plaintiff; neither was there a mutual rescission. *Held*, further, that a certain oral settlement referred to in the opinion did not amount to an accord and satisfaction, and was without legal effect upon the rights and obligations of the parties as evidenced by the written contract. *Held*, further, that defendant had not been put in default by a tender of performance by plaintiff, and that defendant, who had fully complied with his covenants in said contract in seasonable time, and prior to the commencement of this action, was entitled to a decree of specific performance.

Appeal from District Court, Cass County; *Pollock*, J.

Action by William H. Arnett against Elmer E. Smith. Judgment for defendant, and plaintiff appeals. Affirmed.

Pierce & Von Neida and *Ball, Watson & Maclay*, for appellant.

Turner & Lee and *Morrill & Engerud*, for respondent.

YOUNG, J. Action upon an account stated. The defendant denies that an account was ever stated between the parties, and further denies that he is indebted to the plaintiff in any sum whatever. As a further defense, and by way of counterclaim, he asks that the plaintiff be compelled to specifically perform his covenants contained in a written contract for the purchase of certain real estate situated in Cass county. The plaintiff claims that the written contract referred to was superseded by a settlement between the parties and his cause of action is based upon a balance claimed to be due upon such alleged settlement. To properly understand the issues which were presented to the trial court for determination, it will be necessary to state the substance of the pleadings: Plaintiff, for cause of action,

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alleges that on the 5th day of July, A. D. 1900, an account was stated between the plaintiff and defendant, and upon such statement a balance of $475 was found due to the plaintiff from the defendant; that the defendant agreed to pay the same on the 5th day of August thereafter, and that he has not paid the same, nor any part thereof. The defendant challenges the allegations of the complaint by a general denial, and alleges that on the date of the so-called settlement a written contract was in existence between the parties; that plaintiff, either fraudulently and falsely or by reason of his mistake as to the rights of the parties under such contract, claimed that defendant was in default in the performance of said contract, and claimed that he had a right to rescind the same; that plaintiff fraudulently or falsely influenced the defendant to believe that he was in default, and while so influenced, and without default or negligence on his part, he "was induced to enter into negotiations for a settlement of his supposed liability to plaintiff by reason of his supposed breach of said contract, but said negotiations were never completed or executed"; that immediately upon the discovery of his legal rights under the contract he notified the plaintiff that he would insist upon carrying out the terms of the written contract. The defendant further answering, and by way of counterclaim, alleged that on the 23d day of May, A. D. 1900, he was, and ever since has been, the owner of the following described real estate, towit, the S. ½ of section No. 31, in township 141 N., of range 49 W.; that on said last-named date the plaintiff and defendant entered into a written contract whereby defendant agreed to sell and plaintiff agreed to purchase the land above described upon the conditions and terms stipulated in said contract, which contract was attached to and made a part of the answer; that on the 2d day of June, A. D. 1900, defendant tendered to the plaintiff an abstract of title and a warranty deed to said premises at Pontiac, in the state of Illinois, as agreed in the contract, but that plaintiff then and ever since has refused to accept the same, and to pay the purchase money specified in said agreement, and to execute the notes and mortgage in said agreement described. Defendant further alleges that on the 25th day of August, A. D. 1900, and prior to the commencement of this action, he again tendered to plaintiff the abstract and deed to said premises, and that the plaintiff again and still refuses to make the payment and execute the notes and mortgage as agreed in said contract; that the defendant now is, and at all times has been, able, ready, and willing to perform the conditions of said contract then to be performed, and prays for judgment directing the plaintiff to perform his covenants in said contract of purchase. The contract in question, so far as material, is as follows: "Articles of agreement, made this 23d day of May, in the year of our Lord one thousand and nine hundred, between Elmer Smith, a single man, party of the first part, and William H. Arnett, of the second part, witnesseth: That the said party of the first part hereby covenants and agrees that, if the party of the second part shall make the payments and perform the covenants hereinafter mentioned on his part

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to be made and performed, the said party of the first part will convey and assure to the party of the second part in fee simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed, the following lot, piece, or parcel of land in Cass county, North Dakota, to-wit. [Here follows a description of the land.] Said party of the first part agrees to deliver an abstract of title showing a good merchantable title to the above-described premises, and the said party of the second part hereby covenants and agrees * * * to pay to said party of the first part the sum of eight thousand nine hundred and twenty dollars in the manner following: Five hundred dollars cash in hand, the receipt whereof is hereby acknowledged, and the balance as follows, viz.: $2.500 June 2nd, 1900, to be deposited with the National Bank of Pontiac, Illinois, until delivery of deed and contract; $1,560 November 1st, 1900, on or before; $1,000 November 1st, 1901, on or before; $1,000 November 1, 1902, on or before; $1,000 November 1st, 1903, on or before; $1,360 November 1st, 1904, on or before,—with interest at the rate of six per cent. per annum, payable annually, on the whole sum remaining from time to time unpaid. * * * Deed to be given and mortgage taken to secure the balance of the purchase price on payment of $3,000 and interest, being the amount due June 2nd, 1900. Upon the delivery of the deed and the acceptance thereof by the second party, said second party is to have full and absolute possession of the above premises, with all of the appurtenances thereto belonging including all growing crops for the season of 1900." The plaintiff, in his reply, admitted the execution of the contract, but denied that the defendant had tendered the deed and abstract to him on June 2, 1900, or at any time prior to the 5th day of July, 1900, as stipulated in said contract, and alleged that the abstract which was submitted and tendered on June 2, 1900, was not sufficient, in this: That it did not disclose a good and merchantable title in the defendant; that on the 26th day of June, 1900, he notified the defendant that he then rescinded said contract because of defendant's failure to deliver an abstract showing a merchantable title, and demanded the repayment of the $500 theretofore paid by him on the purchase price; that thereafter, and on the 5th day of July, 1900, the subject-matter of said written contract was settled between the plaintiff and the defendant, and an account stated, as alleged in plaintiff's complaint. A jury was called to try the case. At the close of the testimony, upon motion of the defendant's counsel, a verdict was directed against the plaintiff upon his cause of action. Thereupon the court proceeded to try the issues presented by the equitable counterclaim and the plaintiff's reply thereto. Findings of fact and conclusions of law were made and filed favorable to the defendant, upon which a decree of specific performance was subsequently entered as prayed for by the defendant. Thereafter the plaintiff moved for a new trial upon a settled statement of the case. This was overruled. Plaintiff has appealed from the order denying his motion, and has also taken a separate appeal from the judgment. The last-named appeal is taken upon the judg-

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ment roll proper. A new trial is not demanded in this court, the errors relied upon being assigned upon the statutory judgment roll. The two appeals are presented together.

No questions of practice are presented by counsel for either party. Nevertheless we deem it proper to state that correct practice requires that the equity issues presented by the defendant's answer should have been first tried and determined by the court. Had this been done, no issue of fact would have been left for the jury, and we would not be embarrassed by the anomalous record here presented. The established procedure is that, "when an equitable defense is presented, it is to be decided by the court as if it were an equitable proceeding, before other issues are determined, because the determination of the equitable issues in favor of the defendant would put an end to the litigation, and obviate the necessity of trying the legal issues involved." 7 Enc. Pl. & Prac. 810, 811, and cases cited. It will be seen that plaintiff's legal theory is that the written contract of May 23d was entirely superceded and annulled by the subsequent oral contract of July 5th, and that such oral contract is valid and binding upon both parties. If this position is legally sound, it will be conceded that the court erred in directing a verdict against the plaintiff and in decreeing a specific performance of the contract. But if, on the other hand, the written contract was not superceded by the oral contract, in that event it will be conceded that the verdict was properly directed, and the judgment of the trial court was proper. The facts which we deem material to a solution of the questions presented are not in dispute. Wyman & Ball, real estate agents at Fargo, acted as defendant's agents in selling the land to plaintiff. Before forwarding the deed and abstracts of title to plaintiff, they submitted it to their attorneys, Ball, Watson & Maclay, for an opinion, but did not submit a copy of the contract. The abstract so submitted among other things showed a tax deed, executed by the county treasurer of Cass county in December, 1885, for the 1882 taxes, running to one Charles P. Hazeltine, and duly recorded on December 19, 1885. The abstract further showed that the defendant's grantor, one Seth G. Wright, derived his title by a foreclosure of a mortgage, in which it appears that one Charles P. Hazeltine was made a party defendant, service upon him being by publication. The attorneys to whom the abstract was referred for examination gave a written opinion thereon, in which they stated, after referring in detail to the several conveyances in the defendant's chain of title, that: "We are of the opinion that the present legal title to this property is vested in Elmer E. Smith. * * * We do not consider the tax sale made for taxes levied on the land for the year 1885 to constitute any lien, for the reason that said land was a part of the grant of the Northern Pacific Railroad Company, the survey fees were not paid thereon, and such taxes were null and void. *Railroad Co.* v. *Rockne*, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477." On May 31, 1900, Wyman & Ball sent the abstract, together with the defendant's warranty deed, by registered mail, to the National Bank of Pontiac, and inclosed

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therewith five blank notes and a mortgage deed to be executed by the plaintiff pursuant to the terms of the contract. In their letter of transmittal they stated that the title had been examined, and that it was absolutely perfect, and inclosed the written opinion of their attorneys. On June 4, 1900, the bank acknowledged the receipt of the papers, and stated that Mr. Arnett and his attorney were examining the title. On the following day—June 5th—the bank returned the abstract to Wyman & Ball, with a specification of a number of particulars wherein Arnett's attorney considered that it failed to show merchantable title, with a request that such requirements be complied with, and that the abstract, when completed and correced, be returned. One of the objections pointed out was the tax deed to Hazeltine. On June 11th Wyman & Ball returned the abstract to the bank, corrected in the particulars specified, save as to the tax deed. In their letter of transmittal they stated on this point that "none of this land being the N. P. Railroad grant was taxable before the year 1888." The abstract was handed by Arnett to his attorney for further examination, and on June 22d the same was returned to him with a written opinion pointing out that Charles P. Hazeltine, the holder of the tax deed, was not a party to the Wright foreclosure; and that, as "Charles P. Hazeltine was not identified with the tax deed by any findings in the decree, the rights of Charles P. Hazeltine are not determined." The next day—June 23d—Arnett wired Wyman & Ball: "Title not merchantable. Cannot wait longer. Demand return of money." He at the same time wrote Wyman & Ball as follows: "Since the title is not a merchantable one, and so much time has elapsed, I must call the deal off. You will please notify Smith to this effect. It will then be his duty to return the deposit of $500 made by me on the land." He also stated in the letter that a party who was to make him a loan refused to accept the title. Under the same date the bank wrote Wyman & Ball as follows. "With reference to the Arnett-Smith deal, will say that we had agreed to make Mr. Arnett a loan of several thousand dollars if his title was O. K., but we do not care to make a loan on this title in its present condition. Mr. Simmons' (Arnett's attorney's) comments herewith enclosed. I understand that Mr. Arnett refuses to wait longer. The deed and abstract are in our hands awaiting your order." Up to the time when the communications last referred to were received Wyman & Ball were acting for the defendant, Smith, under their original agency. Thereafter they acted on behalf of the plaintiff, Arnett, in carrying out his instructions, and lent to him their personal services for the purpose of procuring a settlement and rescission of the contract. On June 26th Wyman & Ball "notified defendant that plaintiff rescinded the contract because the title was not merchantable," and stated to him the contents of Arnett's letter, wherein he had stated that it was Smith's duty to return the $500 received by him when the contract was executed. They also requested and induced him to consult with the firm of Ball, Watson & Maclay to ascertain what effect the fact that the contract called for

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and required him to give a merchantable title would have upon the rights of the parties. This request was complied with, and the defendant was advised that the title was probably not merchantable, and that it would have to be passed upon by the courts, and that the chances were decidedly against its being held merchantable. Between June 26th and July 5th a number of conversations were had between the members of the firm of Wyman & Ball and the defendant concerning the contract, with the result that the defendant became entirely convinced that he was in default, and that the plaintiff had the right to rescind, as he had attempted to do, and that the defendant was under a legal obligation to repay the $500 theretofore received by him on the purchase price. To facilitate a settlement, the firm of Wyman & Ball conditionally promised to procure a concession of $25 for moneys expended by the defendant in attempting to perfect the sale, which sum covered canceled revenue stamps and the cost of abstract of title. This condition was assented to by the defendant, and he expressed a willingness and anxiety to settle for the sum of $475, and orally promised Wyman & Ball to pay the sum of $475 in one month, but expressly refused to give a note for said sum, as requested by them. On July 5th the plaintiff came to Fargo, and, after ascertaining the condition of the proposed settlement, called upon the defendant at his place of business, in company with Mr. Wyman. In the course of a brief conversation Smith stated that he had spent the $500 which he had received on the purchase price, and he could not then repay it without borrowing which he did not desire to do; that Mr. Wyman had agreed to discount the amount $25, to cover the expenses incurred by him, and, if he (Arnett) was willing to agree to this, the defendant would pay the $475 on August 5th thereafter. Arnett replied that this would be satisfactory. No further conversation was had. In a day or two thereafter the defendant, Smith, consulted the firm of Turner & Lee, his attorneys in the present action, in reference to his title and with reference to his obligations under the written contract. On or before August 5th Smith notified Wyman & Ball that he had decided not to pay the $475; that his attorneys had advised him that he could compel the plaintiff to comply with the written contract. Turner & Lee procured and caused to be recorded a quitclaim deed from Charles P. Hazeltine and wife to the defendant, covering the defect as to the tax deed before referred to, and had the abstract extended to show such correction, with certain other corrections, which need not be mentioned. On the 25th day of August said attorneys, acting on behalf of the defendant, sent to the bank at Pontiac the deed theretofore executed, together with a mortgage and notes for execution by plaintiff, accompanied with a corrected abstract, which concededly showed perfect and merchantable title, with the direction that the deed be delivered to plaintiff upon his making the required payment and executing the notes and mortgage as provided in the written contract. On the same day they wrote to the plaintiff, asking him to call and examine the abstract, and demanded a perform-

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ance of said contract. A similar letter was at the same time written to the plaintiff's attorney at Pontiac. The plaintiff then and at all times since declined to perform, relying entirely upon the alleged rescission and settlement which is the basis of his present cause of action.

The question presented for determination is whether the written contract was annulled and rescinded, and the subsequent oral agreement substituted in lieu thereof. Counsel for plaintiff contend that such was the legal effect of the facts narrated. We are not able to agree to this conclusion. We are of opinion that the facts do not show that Arnett at any time had the right to rescind the contract. Not having such right his attempted rescission was entirely abortive. It is entirely clear that there was no mutual rescission. We reach this conclusion without determining whether the abstract showed a merchantable title before the quitclaim deed was procured from Hazeltine. It is not disputed that the title tendered on August 25th which was prior to the commencement of this action, was perfect and merchantable. The covenants contained in the written contract were mutual and dependent. The defendant was obliged to furnish an abstract showing merchantable title as a condition precedent to his right to demand and receive payment and the notes and mortgage. The plaintiff, on the other hand, was bound to pay or tender the sum named in the contract, and to execute the notes and mortgage therein referred to, as a condition prerequisite to his right to demand and receive the title and conveyance bargained for. The contract did not place a fixed time limit within which the defendant must furnish the abstract showing merchantable title. In the absence of a stipulated time, the defendant was entitled to a reasonable time to perfect his title. After tender of performance by the plaintiff and demand for performance upon defendant, the plaintiff could place the defendant in default only by a proper tender of performance on his part. This he did not do. The notes were not signed; neither was the mortgage executed; nor was the $2,500 required to be paid deposited in the bank so as to be available to the defendant in case the abstract showed the title to be merchantable, nor was it tendered to the defendant. Had the plaintiff brought an action to recover the $500 paid by him to the defendant, basing his cause of action upon the alleged defaults of the defendant, his complaint would not have stated a cause of action, in the absence of an averment of full performance or offer of performance on his part. On this point there seems to be no conflict of authority. *Englander* v. *Rogers,* 41 Cal. 420; *Dennis* v. *Strassburger,* 89 Cal. 583, 26 Pac. Rep. 1070; *Bakeman* v. *Pooler,* 15 Wend. 637; *Strong* v. *Blake,* 46 Barb. 227; *Dunham* v. *Jackson,* 6 Wend. 22, 35; *Johnson* v. *Reed,* 9 Mass. 78, 4 Am. Dec. 36; 2 Warv. Vend. p. 880, § 32. Furthermore, had the plaintiff made a proper offer of performance, and a demand upon the defendant for the delivery of an abstract showing merchantable title, nevertheless he would not have had the right to immediately rescind. In cases where the contract does not

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fix a time limit for perfecting title the vendor is entitled to a reasonable time after notice of defects in which to perfect his title or remedy any defects therein, and not until the giving of such notice, and an offer to perform the contract on the purchaser's part upon receiving a perfect title, and the refusal of the defendant thereafter to convey as agreed, would a purchaser have a right to rescind the agreement. *Anderson* v. *Strassburger,* 92 Cal. 38, 27 Pac. Rep. 1095. As was said by the court in *Andrew* v. *Babcock,* 63 Conn. 109, 26 Atl. Rep. 715: "The established principle is that, where a contract is entered into in good faith, and time is not of its essence, and is not made material by the offer to fulfill by the other party and a request for a conveyance, the vendor will be allowed reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. All that is necessary is that the plaintiff is able to make the stipulated title at the time when, by the terms of the agreement, or by the equities of the particular case, he is required to make the conveyance to entitle himself to the consideration." *Easton* v. *Montgomery,* 90 Cal. 307, 27 Pac. Rep. 280, 25 Am. St. Rep. 123; *Moore* v. *Smedburgh,* 8 Paige, 600; *Dressel* v. *Jordon,* 104 Mass. 407; *Mitchell* v. *Allen,* 69 Tex. 70, 6 S. W. Rep. 745; *Dodson* v. *Hays,* 29 W. Va. 577-594, 2 S. E. Rep. 415; *Logan* v. *Bull,* 78 Ky. 607. It follows, necessarily, from an application of the foregoing principles to the facts of this case, that plaintiff's effort to rescind the contract was entirely unavailing, and without legal effect.

We may now inquire whether there was a mutual rescission by the parties when they met in Fargo on July 5th. The facts negative of any such conclusion. Mutual rescission implies that the minds of the parties met with the common desire and purpose to cancel the mutual obligations of the written contract. It is true the record shows that the plaintiff has at all times been desirous of being relieved from the contract, but the reverse is true as to the defendant. He has at all times been willing and anxious to complete the same, and at no time has he desired to rescind. The oral agreement of July 5th did not, in terms, relate to a rescission of the written contract. Prior to that time the defendant had been convinced by the plaintiff's agents that he (the defendant) was in default, and that he was legally obligated to repay to the plaintiff the $500 which he had received upon the purchase price. The defendant's promise of July 5th was based upon this supposed liability, and had reference to nothing else. The defendant then believed that he had forfeited his rights under the contract, and that plaintiff had a lawful right to the repayment demanded. These facts do not show a mutual rescission.

Plaintiff's counsel further contend that the oral promise of the defendant on July 5th operated as an accord and satisfaction of all matters connected with the written contract, and that, in legal effect, it superseded it. To this contention we cannot agree. As before

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stated, the only matter in contemplation between the parties was the adjustment of the supposed money liability of the defendant, and nothing else. If the transaction could be termed an accord and satisfaction, it would be applicable only to the matter then being adjusted, which was, as stated, the defendant's liability to repay the $500 formerly received. But, conceding that the alleged settlement extended to all features of the written contract, nevertheless we are agreed that it did not amount to an accord and satisfaction. "An accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled." Section 3824, Rev. Codes. "Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed." Section 3825, Id. "Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction." Section 3826, Id. The foregoing sections are merely a legislative declaratation of the common law. The supreme court of South Dakota in referring to and construing these sections, which are embodied in § § 3483-3485, Comp. Laws, in force in that state, in *Carpenter* v. *Railway Co.*, 64 N. W. Rep. 1120, said: "To establish a plea of accord and satisfaction under the statutory or common law, it must not only appear that there was an agreement to accept, in full settlement of an obligation, something different from or less than that to which one of the parties is entitled, but it must be shown that such agreement has been fully executed, and the obligation extinguished by the creditor's actual acceptance of the consideration specified in the agreement constituting an accord." See cases cited in opinion, which fully sustain the text above quoted. As was said by Mitchell, J., in *Hoxsie* v. *Lumber Co.*, 41 Minn. 548, 43 N. W. Rep. 476: "There must be a satisfaction as well as an accord. The accord agreement must be fully executed, and the thing to have been taken must have been received and accepted in satisfaction, in order to constitute a bar to a recovery." An accord is executory as long as something remains to be done in the future. It is sufficiently executed only when all is done which the party agrees to accept in satisfaction of the pre-existing obligation. *Bragg* v. *Pierce*, 53 Me. 65; *Therasson* v. *Peterson*, *41 N. Y. 636; *Babcock* v. *Hawkins*, 23 Vt. 561; *Edwards* v. *Bryan*, 88 Ga. 248, 14 S. E. Rep. 595; *Memphis* v. *Brown*, 20 Wall. 289, 22 L. Ed. 264, 268; 2 Smith, Lead. Cas. 149, 150, 385, 389; *Line* v. *Nelson*, 38 N. J. Law, 358; *Tilton v. Alcott*, 16 Barb. 598; *Russell* v. *Lytle*, 6 Wend. 391, 22 Am. Dec. 537; *Daniels* v. *Hallenbeck*, 19 Wend. 408; *Young* v. *Jones*, 64 Me. 563, 18 Am. Rep. 279; *Cushing* v. *Wyman*, 44 Me. 121; *Bank* v. *De Grauw*, 23 Wend. 342, 35 Am. Dec. 569; 1 Beach, Mod. Cont. § 437. As was said by the court in *Kromer* v. *Heim*, 75 N. Y. 574, 31 Am. Rep. 491: "Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord, and the original obligation remains in force." In the case under con-

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sideration there was an agreement by the plaintiff to receive the sum of $475 in full discharge of his claim of $500, and a promise to pay said sum by the defendant 30 days thereafter. This amounted to an accord executory. But, as we have seen, a mere accord is not sufficient. There must be a satisfaction, to render it effective; that is, the reception of the thing agreed to be received. In this case the thing agreed to be received in satisfaction was the sum of $475, which the defendant declined to pay. It follows from what we have said that the oral agreement of July 5th did not supersede the written contract, or, in legal effect, alter the rights and liabilities of the parties thereunder in any way whatever. But we think the alleged settlement was without legal effect for another reason. The defendant's consent thereto was necessary to give it validity. True, he gave an apparent consent. But such consent was not free, for it was clearly given under a mutual mistake of law. It is apparent that the defendant agreed to make repayment under the belief that under the law he had forfeited all his rights under the written contract, and it is apparent that this belief was induced by the plaintiff. The mistake as to their legal rights was mutual. Upon this state of facts the defendant's consent was not free, and was subject to be rescinded, and that he did rescind is not disputed. See § § 3836, 3841, 3843, 3844, 3854, Rev. Codes.

The conclusion follows necessarily from the views heretofore expressed that the written contract was and is in full force and effect, and that the defendant is entitled to have the same specifically performed. It is not material whether the abstract as originally presented showed merchantable title. The defendant not having been placed in default by a tender of performance by the plaintiff, any conclusion which we might reach upon the merchantability of the title as shown by the abstract first presented would not affect their legal rights as now presented, for the reason that the abstract furnished on August 25th, which was prior to the commencement of this action concededly showed perfect and merchantable title, such as defendant had agreed to give.

The order and judgment appealed from will be affirmed, and it is so ordered. All concur.

(88 N. W. Rep. 1037.)

OLIVER C. DALRYMPLE *vs.* SECURITY IMPROVEMENT COMPANY.

Homestead Exemption.

Under the laws of this state the statutory homestead is exempt from judgment liens and forced sales, save as to certain debts expressly excepted by the statute, so long as the property retains

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its homestead character, and an incumbrance or alienation of the same does not constitute a fraud upon the judgment creditors of the holder of the title.

Judgment Not Lien Against Legal Owner.

Judgments become liens upon real estate only to the extent of the interest of the judgment debtor, and when the judgment debtor has the bare legal title, without interest, and the equitable title is in another, the lien, in equity, does not attach.

Judgment Lien Subject to Prior Contract.

The lien of a judgment entered against the vendor of real estate after a contract of sale, and before the execution and delivery of a conveyance to the vendee, is subject to such contract. It may be made effective against such portions of the purchase price as remain unpaid. When the entire purchase has been paid or the same is due to another than the vendor, no lien attaches.

Quieting Title.

It is *held*, on the facts stated in the opinion, that the judgments owned by the several defendants do not constitute liens upon the real estate in controversy in this action, and that the trial court properly quieted title in plaintiffs.

Appeal from District Court, Cass County; *Lauder*, J.

Action by Franklin S. Dalrymple and others, by Oliver C. Dalrymple, their guardian, against the Security Loan & Trust Company of Casselton and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Pollock & Scott and *Morrill & Engerud*, for appellants.

Newman, Spalding & Stambaugh, for respondents.

YOUNG, J. Action to quiet title and to determine adverse claims to real estate, and for other relief. The property in controversy consists of a house and two lots situated in the city of Casselton, and formerly occupied by O. C. Dalrymple and Isabella C. Dalrymple, his wife, as the family homestead. The fee title to the real estate in question was in Isabella C. Dalrymple from March 7, 1883, until May 3, 1891, during all of which time it constituted the family residence of herself and husband and their children. On the last-named date Isabella C. Dalrymple died intestate, leaving as her only heirs her husband, O. C. Dalrymple, and four minor children, one of whom has since died. The plaintiff's herein are the three surviving children. Seven of the defendants are judgment creditors of O. C. Dalrymple, and claim that their judgments constitute liens upon the property involved in this litigation. The Security Loan & Trust Company has an unsatisfied mortgage upon the premises, which, however, concededly, has been paid. Sales were made under executions issued on two of the aforementioned judgments, and sheriff's certificates were issued to the judgment creditors, who were purchasers at the sales. H. G. Scott, the remaining defendant, is in

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possession of the premises under a lease made by O. C. Dalrymple as guardian of the minor children. The trial court found that the entire legal and equitable title to the premises in controversy was vested in the plaintiffs, and entered judgment quieting title in them as against all claims, estates, liens or interests of the defendants, and decreeing a cancellation of the mortgage standing unsatisfied in the name of the Security Loan & Trust Company, and the two sheriff's certificates issued on the sales made under the judgments, and adjudging that the defendant H. G. Scott holds the premises as a tenant of these plaintiffs. The defendants have appealed from the judgment, and in a settled statement of the case, containing all of the evidence offered at the trial have demanded a review and retrial of the entire case in this court.

The real question in controversy is whether the judgments against Oliver C. Dalrymple constitute liens upon the property in question. It is agreed that under § 3742, Rev. Codes 1899, relating to the order of succession to the estates of intestates, the title to the property in question, upon the death of Isabella C. Dalrymple, on May 3, 1891, descended one-third to her surviving husband, Oliver C. Dalrymple, and the remainder to her four minor children, three of whom are plaintiffs in this action. The defendants concede that the plaintiffs are the owners on an undivided three-sixths of the property in question, unincumbered by the liens on the judgments, but contend that such judgments are liens upon the one-third which O. C. Dalrymple inherited, and also the one-sixth interest which descended to the fourth child, now deceased; the father being the sole heir of such deceased child. Section 3742, supra. In other words, defendants contend that the plaintiffs and their father, Oliver C. Dalrymple were tenants in common, and that their judgments become liens upon the interest of Oliver C. Dalrymple. The plaintiffs, on the other hand, deny that the judgments are or ever were liens upon the property in question, and contend that, by virtue of certain conveyances to which we will hereafter refer, they are vested with the entire title, both legal and equitable, to said premises.

The facts essential to a determination of the questions presented by this appeal may be stated as follows: Isabella C. Dalrymple was the owner not only of the property here in controversy, but also of other real estate, consisting of farm lands. Her husband was indebted to the Cass County Bank in a considerable sum. On October 3, 1889, she joined her husband in a conveyance of the property here involved to said bank, and at the same time conveyed to said bank farm lands to the amount 1,440 acres. The several conveyances were in form quitclaim deeds, but were given for the purpose of security only, and were, in legal effect, mere mortgages. After the death of Isabella C. Dalrymple, as before stated, her surviving husband continued to occupy the premises here in question, with the minor children, as their homestead, until about November, 1894. On April 24, 1893, which was subsequent to his wife's death, and prior

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to the abandonment of the homestead, Oliver C. Dalrymple had a settlement and accounting with the Cass County Bank, at which the amount of his indebtedness secured by the conveyances before mentioned was fixed at the sum of $21,248.64. It is agreed that the property covered by the bank's mortgages did not exceed the value of $16.500, and it is further conceded that O. C. Dalrymple was then, and has since been, insolvent. On said last-named date a written contract was entered into between O. C. Dalrymple and said bank which provided for a transfer to said bank of both the possession and title to all of the property covered by the bank's mortgages, including not only the interest of Oliver C. Dalrymple, but also that of the four minor heirs. This contract, after describing the several conveyances executed by the deceased, Isabella C. Dalrymple, to the bank, and the amount of the then existing indebtedness, among other things, recites that: "Whereas, Isabella C. Dalrymple * * * has died, leaving as her heirs and next of kin Oliver C. Dalrymple * * * and four children [naming them], and a foreclosure of the deeds becomes necessary in order to give said Cass County Bank an absolute title in fee to said premises, and it being by all the parties deemed advisable for said bank to take such title in fee: Now, therefore, in consideration of these premises, and the sum of one dollar in hand paid to said Oliver C. Dlrymple, it is now mutually agreed as follows: Said Oliver C. Dalrymple shall at once secure from the county court of Cass county letters of guardianship over the persons and property of the minor heirs of Isabella C. Dalrymple, deceased, to the end that the bank can make proper and legal service of the foreclosure proceedings upon him as such guardian. * * *" The contract, in substance, further provides that (2) Said Cass County Bank will at once bring an action or actions to foreclose the deeds above described, claiming to be due on this date the amount heretofore agreed to be due, to-wit, $21,248.64. Said Oliver C. Dalrymple agrees to answer at once, admitting the claim of the said bank, and consenting that judgment be entered forthwith against him. (3) Dalrymple, on his part, further agrees to give a bill of sale of all personal property on which the bank has a chattel mortgage, and to permit said bank to take immediate possession thereof, and sell and dispose of the same. Further, that said bank should have full and complete possession of all the real estate covered by the mortgages, with power to sell the same as it sees fit, without any liability to account for rents or profits arising from such sale, excepting therefrom lots 3 and 4 in block 20 in the city of Casselton, which is the property here in controversy. (4) The bank, on its part, agreed to permit said Dalrymple to take possession and control of the homestead, and to have and use the same as his own, free from all rent charges. Said bank further agreed that, at the time "of getting its title perfected by foreclosure proceedings to the other land above described, to convey by special warranty deed, free and clear of all incumbrances, said lots 3 and 4,

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block 20, to said Oliver C. Dalrymple, or such other person as he shall designate." (5) The bank further agreed that it would keep the buildings on the homestead insured in the sum of not less than $1,500, and, in case of loss by fire prior to the conveyance of said lots to the said Oliver C. Dalrymple, moneys received therefor should be paid to said Oliver C. Dalrymple, in addition to conveying him said lots. (6) The bank further agreed that after said Dalrymple had been appointed guardian of said children, and had served his answer as agreed, admitting the amount of the bank's indebtedness, to pay to him the sum of $1,000 in full payment of all matters between them, and to cancel and surrender all obligations, including notes, mortgages, and judgments, held by it against him, and to give a receipt in full for all claims and demands of every kind and nature. The contract contains this further recital: "To this end said Oliver C. Dalrymple agrees to treat this transaction made this day as a full and final settlement between them, and guarantees that, as far as he and his heirs are concerned, they will neither ask nor demand of said bank any of said land or personal property above described, except the homestead lots described as lots 3 and 4, block 20, First addition to Casselton, hereinbefore provided to be conveyed by said bank to Oliver C. Dalrymple, and the following articles of personal property." Here follows the description of certain personal property which was released to said Dalrymple, free and clear of all liens or mortgages held by the bank.

It is conceded that the stipulations contained in the foregoing contract were fully performed, both on the part of the Cass County Bank and on the part of Dalrymple. The bank foreclosed its several mortgages by actions in which Dalrymple and the four minor children were made parties defendant. Judgment was obtained by default, and all of the property covered by the mortgages, including the property here in question, was sold under said judgment on January 29, 1895; the bank being the purchaser at the sale. No redemption was made, and on the 3d day of April, 1896, a sheriff's deed was issued to the bank for all said property including the lots here in question. The property here involved stood in the name of the bank until April 8, 1896, on which date, at the request of O. C. Dalrymple, it was conveyed by warranty deed to John C. Dalrymple, an uncle of the minor children of Isabella C. Dalrymple, who had been appointed in the state of Pennsylvania as guardian of the estate of said minors in that state. On the 13th day of April, 1897, John C. Dalrymple made, executed, and delivered to one J. M. Smith a quitclaim deed of the premises here in question, which deed purported, in terms, to convey to him said property as trustee, and for the use and benefit of the minor children of Isabella C. Dalrymple.

This case was before this court upon two former appeals, upon demurrers to the complaint. *Smith v. Trust Co.*, 8 N. D. 451, 79 N. W. Rep. 981; *Dalrymple* v. *Trust Co.*, 9 N. D. 306, 83 N. W. Rep. 245. It was determined on such appeals that upon the facts alleged

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in the complaint, which were substantially as hereinbefore stated, the title to the premises in question (both that held by the minor children and by the surviving husband) was devested by the foreclosure of the bank's mortgage, and the same was vested in the bank under the sheriff's deed issued in pursuance of the foreclosure proceedings, and, further, that the legal effect of the conveyance by the bank to John C. Dalrymple was to vest the title, both legal and equitable, in the minor children, the plaintiffs herein. The facts pleaded upon which the foregoing conclusions were based were found by the trial court to be true, and upon a review of the evidence in this court we reach the conclusion that the findings are fully sustained. To this extent, therefore, these questions are ruled by our conclusions upon the former appeals.

On this appeal counsel for appellants urge two grounds for reversing the judgment of the trial court. It is urgd in the first place that the contract entered into between Dalrymple and the bank, in pursuance of which the foreclosure was made, and the title passed to the bank, and subsequently to these plaintiffs, was fraudulent as to judgment creditors of Dalrymple, and that for this reason the title of Dalrymple did not pass to the bank by the foreclosure proceedings, but still remains in him, incumbered by the liens of the judgments. This contention is without merit. As has already been stated, the property in question, which the defendants seek to subject to the payment of their judgments, constituted the family and statutory homestead from 1883 until November, 1894. None of the several judgments of the defendants were entered prior to the attaching of the homestead exemption. The homestead right existed on April 24, 1893, the date when the contract in question was executed. It is apparent upon this state of facts that Dalrymple could incumber or alienate his interest in said property without consulting his creditors. Having the character of a homestead it was not subject to levy and sale under execution, and was not bound by the liens of judgments against him. Rev. Codes, § 3605; *Kvello* v. *Taylor*, 5 N. D. 76, 63 N. W. Rep. 889; 1 Black, Judgm. § 425; 2 Freem. Ex'ns. § 355. No valid reason existed to prevent Dalrymple from conveying his estate and interest in the property directly to the bank by deed, and it cannot be doubted, had he done so, the bank would have acquired all of his estate, entirely freed from the lien of the defendants' judgments. We agree with counsel for defendants that the foreclosure "was merely a form adopted to effectuate the conveyance of title, and thus execute the agreement of Dalrymple to convey, and the bank to accept, the farm lands in satisfaction of the debt." As has been said, Dalrymple could have conveyed all of his interest directly to the bank without impairing the rights of judgment creditors, and no valid reason is or can be urged why the same result does not follow a transfer of title through the foreclosure made in pursuance of the contract in question.

Counsels' second contention is that the judgments became liens

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upon the property in question when the same was abandoned by Dalyrmple in the fall of 1894, and that, inasmuch as the judgment creditors were not made parties to the foreclosure proceedings, their right of redemption has not been cut off, but, on the contrary, that the liens of such judgments still exist, to the extent of Dalrymple's interest in the property at the time the homestead was abandoned. This contention can be asserted only as to five of the judgments. The remaining two were not entered until after the issuance of the sheriff's deed to the bank, and plainly such judgments never became liens upon the property in question. It must be conceded that the liens of the other five judgments attached to Dalrymple's interest, if he had an interest to which such liens could attach. That he had the legal title to an undivided one-third of the property is conceded. But mere title in Dalrymple is not sufficient to sustain judgment liens. There must be an interest to which the lien can attach. The law is well settled that the lien of a judgment does not attach to naked title, but only to the judgment debtor's interest in real estate; and if he has no interest, though possessing the naked title, then no lien attaches. *Thomas* v. *Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740. As was said by the court in *Hayes* v. *Reger*, 102 Ind. 524, 1 N. E. Rep. 386: "The interest which the lien of a judgment affects is the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show (there being no intervening fraud) that the apparent ownership of another is or was not real; and when the judgment debtor has no other interest, except the naked legal title, the lien of a judgment does not attach." *Lounsberry* v. *Purdy*, 11 Barb. 490; *White* v. *Carpenter*, 2 Paige, 217; *Keirsted* v. *Avery*, 4 Paige, 9; *Brown* v. *Pierce*, 7 Wall. 205, 19 L. Ed. 134; *Hydraulic Co.* v. *Loughry*, 72 Ind. 562; *Moyer* v. *Hinman*, 17 Barb. 137; Freem. Judgm. § § 355, 356; 1 Black, Judgm. § 421. The concensus of judicial opinion, as stated by Freeman on Judgments, is that: "Whenever a lien attaches to any parcel of property, it becomes a charge upon the precise interest which the judgment debtor has, and no other. The apparent interest of the debtor can neither extend nor restrict the operation of the lien, so that it shall incumber any greater or less interest than the debtor in fact possesses." The question here presented has arisen most frequently in cases where judgments have been entered against a vendor of real estate after a valid contract to convey, and before the delivery of a conveyance to the vendee. It is held that on a sale under such intervening judgment the sheriff's vendee succeeds to the precise situation of the original vendor, and becomes entitled to require and receive payment of the balance of the purchase money. As was said by the court in *Wells* v. *Baldwin*, (Minn.) 10 N. W. Rep. 427: "In other words, the purchaser at such a sale would be entitled to the same rights as the vendor in the contract had, and would be compelled to make a conveyance to the vendee upon precisely the same terms upon which the vendor could have been com-

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pelled to convey." It is well settled that the lien of a judgment attaching to real estate after a contract of sale extends only to the interest of the vendor, and is entirely subject to the contract of sale. 1 Black, Judgm. § 438; *Berryhill* v. *Potter*, (Minn.) 44 N. W. Rep. 251; 2 Freeman Judgments, § 364; *Filley* v. *Duncan*, 1 Neb. 134, 93 Am. Dec. 337, and case cited in note.

Tested by the foregoing principles, we may now inquire whether, upon the facts of this case, the judgments ever became a lien upon the premises in question. We have no hesitation in giving a negative answer to this question. This conclusion is based upon the ground that Dalrymple had at no time any interest in the property to which liens could attach. He had legal title to an undivided interest, but, as we have seen, bare legal title is not sufficient to sustain the lien of a judgment. The entire estate and title which descended to Oliver C. Dalrymple and the four minor children upon the death of his wife was mortgaged to the bank to secure his individual debt to the amount of $21,248.64. It is conceded that the value of all of the mortgaged property did not exceed $16,500. As between the heirs and the bank, there was in fact no valuable equity. The property was mortgaged for more than it was worth. But not only was the property mortgaged for an amount greatly in excess of its actual value, but Dalrymple's interest was incumbered with the greater proportion of the burden of the incumbrance. The debt secured being his individual debt, the other heirs were entitled in equity to have their interests entirely freed from the lien of the mortgages, and, as between them and their father, to have the burden of the same cast entirely upon his interest in the property. The amount of the mortgage debt, as has been stated, was $21,248.64. It is conceded that Dalrymple's one-third interest in all of the property mortgaged was only $5,500 in value, and that the interest of the four minor children was $11,000. The entire debt being the individual debt of Dalrymple, his interest in the property could be reached by judgment creditors only after paying the entire mortgage debt; and the value of his interest, as will be seen, is barely one-fourth of the amount for which it was incumbered. No attempt has been made by any of the judgment creditors to redeem from such incumbrance; neither do they offer to redeem in this action; and it is entirely apparent that no redemption would be made, even if the right to redeem existed. But it is entirely clear, upon the facts already stated, that the defendants never had a right of redemption. The contract entered into between Dalrymple and the bank for the transfer of his title to the bank was valid and binding upon both parties. The judgments, clearly, were not liens when it was entered into, and any rights which the judgment creditors may have are entirely subject to said contract. Under the rule previously stated, Dalrymple's judgment creditors could only reach such portions of the purchase money which the bank owed to Dalrymple in pursuance of the contract. No attempt has been made by any of the judgment

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creditors to reach such purchase money, or any portion of the property which the bank agreed to transfer as consideration for the transfer to it of the property in question. But had they done so, their efforts would have been abortive, for the reason that it appears that the entire consideration paid to the bank for the property which it deeded to John C. Dalrymple, and which is here in question, and also the $1,000 paid to Oliver C. Dalrymple, and personal property released to him, moved entirely from the children. Upon this state of facts, the money so paid, property delivered, and real estate conveyed, belonged to the children who paid the consideration. Had the bank conveyed the property here in question to Oliver C. Dalrymple directly, instead of conveying it to John C. Dalrymple in pursuance of the contract and in accordance with the intention of the parties, nevertheless the judgment liens would not have attached. A trust would have resulted in favor of the minor children. Section 3386, Rev. Codes, provides that: "when a transfer of real property is made to one person and the consideration therefor is paid by or for another a trust is presumed to result in favor of the person by or for whom such payment is made."

In January, 1896, Howard C. Dalrymple, one of the four minor children, died. Under § 3742, Rev. Codes, his estate in the property in question descended to his father, Oliver C. Dalrymple. It is contended by counsel for appellants that the judgments became liens upon such interest. All that may be said as to this contention is that on April 3, 1896, which was after the death of Howard C. Dalrymple, the bank obtained the title to all of said property through the sheriff's deed. The title so obtained, which, as has been said, was both legal and equitable, was thereafter, and on April 8, 1896, conveyed to said John C. Dalrymple for the then surviving minor children who are the plaintiffs in this action.

For the reasons stated, we are of opinion that the title was properly quieted in the plaintiffs. The trial court found and adjudged that H. G. Scott, one of the defendants herein, holds the premises in controversy as tenant for plaintiffs. No accounting, however, for rent, was made or taken. The judgment in this action will therefore not prevent an independent action for such accounting, if the same shall be necessary.

Judgment affirmed. All concur.

(88 N. W. Rep. 1033.)

N. D. GAGNIER *v.* THE CITY OF FARGO.

Negligence of Municipal Corporation.

Under the ordinances of the city of Fargo quoted in the opinion it is *held* that the plaintiff was rightfully riding his bicycle upon the sidewalk in question when injured, and that the city would

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be liable for damages to the plaintiff, if, without fault on his part, he was injured by reason of the fact that such walk was not in reasonably safe condition for travel by pedestrians.

Bicycle Riding on Sidewalk.

The trial court instructed the jury that the city would be liable for injuries suffered under such circumstances if the sidewalk was not in reasonably good and safe condition for public travel. *Held* error, as public travel on such walk includes traveling by persons by riding on a bicycle.

Degree of Care.

The duty of the city is fulfilled, so far as bicycle riders are concerned, if the sidewalks are in condition for reasonably safe travel thereon by pedestrians.

Appeal from District Court, Cass County; *Pollock*, J.

Action by N. D. Gagnier against the city of Fargo. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

H. F. Miller, for appellant.

Pierce & Von Neida, for respondent.

MORGAN, J. On October 18, 1899, the plaintiff was riding on his bicycle on the sidewalks of the defendant city, and was thrown therefrom and injured. He brings this action to recover damages for such injury. The complaint alleges that the city "negligently suffered and permitted the sidewalk on which the injury occurred to be and remain unsafe, unsuitable and insufficient for the public use and travel thereon," and that such sidewalk was "rendered unsafe, unsuitable, and insufficient * * * by reason of the fact that many bricks had been removed therefrom, leaving a large, deep, and dangerous hole therein, * * * and also by reason of the fact that other bricks in said sidewalk, around the borders of said hole therein, were then and there loose, and not properly bedded upon the surface of the ground, so that pressure upon them would overturn them." The complaint further states, in substance, that while riding on such sidewalk on his bicycle on said day, and while in the exercise of due care, and without fault of his own, plaintiff was thrown from such bicycle by reason of such defective and unsafe conditions of such sidewalk, and injured. After a trial a verdict was rendered in his favor for the sum of $300. The defendant duly moved for a new trial upon a statement of the case duly settled, and such motion was denied. The city appeals from the order denying the motion for a new trial.

The assignments of error relate to alleged errors in giving instructions to the jury, errors of law in admitting testimony, the refusal to direct a verdict for the defendant, and the insufficiency of the evidence to justify or sustain the verdict. A consideration of

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two of the assignments will suffice to decide the case as presented on the appeal. These two assignments pertain to the question whether the city is liable, in any event, for damages growing out of injuries caused while riding a bicycle on the sidewalks of the city, and whether the instructions to the jury, duly excepted to, correctly laid down the law as to the liability of the city for injuries to persons caused by defective sidewalks while such persons are riding thereon on bicycles.

The city of Fargo was incorporated as a city under the general law for the incorporation of cities. Under such general law the city council is vested with power to lay out streets, and to regulate the use of the same. Like power is vested in the council "to regulate the use of sidewalks." Section 2148, Rev. Codes. Under such general law the city council of Fargo enacted the following ordinances:

"Sec. 5. No person shall place, push, draw or back any wagon, cart or other vehicle on any sidewalk, or use, drive or ride any horse or other animal, wagon, sleigh or other vehicle thereon, unless it be in crossing the same to go into a yard or lot where no other suitable crossing or means of access is provided."

"Bicycle Ordinance.

"(1) Bicycles on Sidewalks of What Streets. No person shall ride any bicycle or tandem on the sidewalk of that part of any street or avenue upon which the roadway of such street or avenue is paved or on the west side of Eighth street South between Front street and Eighth avenue South or on Roberts street between Northern Pacific avenue and Second avenue South.

"(2) Shall Have Alarm—How Given—Speed. No person shall ride any bicycle or tandem on any street or avenue at any time without carrying an alarm bell or whistle, which shall be rung or sounded at least 75 feet before meeting or passing a person on a similar vehicle or on foot upon any sidewalk * * * and the speed of all bicycles or tandems shall be reduced to not more than five miles per hour while meeting or passing any person on any sidewalk."

In our opinion, § 5, given above, was not enacted with a view to prohibit the riding of bicycles on the sidewalks of the city of Fargo. The use of the word "vehicles" in the ordinance, it is claimed, gives it a sufficiently broad meaning to include bicycles. That the bicycle is now classed as a vehicle is true. Had the ordinance forbidden the use of all vehicles on the sidewalks, it would, without question, be a prohibition of the use of the bicycle on the sidewalks. But if that ordinance prohibits the use of bicycles on the sidewalks, it must be virtue of the fact that the word "vehicle" includes in its meaning a bicycle. The word "vehicle" is here used in connection with the words "wagon," "cart," and "sleigh," and was intended to include, and should be construed as limited to, other vehicles of a like character with those mentioned. This construction seems the more

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reasonable in view of the provisions of the bicycle ordinance quoted above. If § 5 was intended to include within its provisions bicycles, then the passage of the ordinance prohibiting the use of bicycles on certain streets was unnecessary and accomplished nothing, and was an enactment the subject of which was already covered by ordinances already in force, or enacted at the same time. Construing the three ordinances together, effect can be given to all of them only by construing the first as not intended to include bicycles within its prohibition.

Coming now to a consideration of the bicycle ordinance, it is clear that § 1 is an express prohibition against riding the bicycle on the streets and avenues therein described. The injury of which the plaintiff complains occurred on Sixth avenue North between the points of intersection with Second and Third streets North. Sixth avenue North is not paved, and is not included within the district on which the riding of bicycles is prohibited under § 1. This brings us to the consideration of the provisions of the ordinance, in § 2 thereof, defining the conditions under which it shall be unlawful to ride bicycles on streets or avenues not included within the district in which the use of bicycles is absolutely prohibited. Under the language of such section, it cannot be said that the use of bicycles is absolutely prohibited or authorized. In effect, and by necessary implication, the language permits their use there if the conditions named are complied with. To ride a bicycle on the avenue where the accident occurred was not unlawful in itself, nor prohibited by an ordinance. The plaintiff was rightfully riding his bicycle there under a conditional authority given by the city and therefore with its assent. The matter of authorizing or prohibiting the using of the sidewalks by persons riding bicycles is within the powers delegated to city councils. Such councils may license the use of the sidewalks by such persons, or may entirely prohibit their use to persons riding bicycles. Although the sidewalks are primarily constructed and to be used by pedestrians, and the bicycle is a vehicle, that under some circumstances more properly belongs to the highway or street, still the council is empowered to regulate the conditions under which the sidewalks may be used by bicyclers, or to prohibit the use of the sidewalks by them entirely. This power is left to the discretion of city councils, as they can easily determine when the use of the sidewalks by persons riding bicycles is or may be dangerous, and when not dangerous, and necessary for the convenience, business, or pleasure of the traveling public. The following cases will be found instructive upon the question of the powers of city councils to regulate the use of streets and sidewalks for bicycles: *Lechner* v. *Village of Newark,* (Sup.) 44 N. Y. Supp. 556; *Jones* v. *City of Williamsburg,* (Va.) 34 S. E. Rep. 883, 47 L. R. A. 294; *Swift* v. *City of Topeka,* 43 Kan. 671, 23 Pac. Rep. 1075, 8 L. R. A. 772; *Lee* v. *City of Port Huron,* (Mich.) 87 N. W. Rep. 637; *Holland* v. *Bartch,* 120 Ind. 46, 22 N. E. Rep. 83, 16 Am. St. Rep. 307.

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The city having by these ordinances permitted persons to ride on the sidewalks under certain conditions and regulations, it follows that the plaintiff was not unlawfully riding his bicycle on the walk in question when the injury occurred. The city having thus permitted this sidewalk to be used by bicycle riders, what, if any, duty did it owe to such persons, so far as maintaining such walk in such condition that such use of it would not be attended with danger? In this state it has been held that cities owe it as a duty to pedestrians to keep the sidewalks in condition for safe travel, and that such cities are liable for damages occurring by reason of the negligence of the city in not keeping such walks in proper repair for safe travel thereon, and are so held liable although not made so by express statute. *Ludlow* v. *City of Fargo,* 3 N. D. 485, 57 N. W. Rep. 506. That sidewalks are not intended for use by vehicles in general cannot be disputed. That such walks are built to be used by pedestrians may be taken as true, also. That the bicycle is classed as a vehicle is also true. The authorities so hold, we believe, without exception, 4 Am. & Eng. Enc. Law, page 20, and cases cited; also cases hereinbefore cited; *Myers* v. *Hinds,* (Mich.) 68 N. W. Rep. 156; *Thompson* v. *Dodge,* 58 Minn. 555, 60 N. W. Rep. 545, 28 L. R. A. 608, 49 Am. St. Rep. 533. The city, by its enactments, made it rightful for the plaintiff to ride on the walk in question upon his bicycle. It did not thereby, nor is there any general law to that effect, assume any new obligation or duty to him while riding the bicycle on such walk. Its duty is to maintain the walk in suitable condition for pedestrians, and its duty to bicycle riders, to any greater degree than to pedestrians, cannot be predicated upon the mere fact of having granted permission to use the walks with bicycles. It is a matter of common knowledge and observation that a sidewalk in suitable condition for safe travel by pedestrians would not be safe for bicycle riders traveling thereon. A very slight defect in the walk or road often causes an accident to the bicycle rider, which could under no circumstances interfere with travel by pedestrians. The test whether the sidewalk is in safe condition for travel is that it must be safe for pedestrians, and not for those using bicycles. The trial court instructed the jury as follows: "Under the law, it is the duty of the defendant city to keep its sidewalks in reasonable good order and condition for the safe use and convenience of the traveling public. The defendant's duty to keep its sidewalks in a reasonably safe condition for travel applies to a defect in the construction, as well as the neglect to repair any injuries found therein. If you find from the evidence that the sidewalk in question was in an unsafe condition, and that the plaintiff was injured thereby without any contributory negligence upon his part, * * * then your verdict will be for the plaintiff." The defendant duly excepted to the giving of each of these instructions. The objection urged against them is that the city is to be held liable, under the rules therein laid down, if the sidewalks are not safe for travel by bicycle riders. The evidence in the case shows

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that this walk was used by persons while riding on bicycles, and the jury must have understood from such instructions that these walks must be kept in condition for safe travel by the traveling public, including those persons riding bicycles. Such is not the law, and a different rule has been upheld even in cases where permission was granted to persons to ride their bicycles upon sidewalks upon payment of a sum of money as a license. The court, in *Sutphen* v. *Town of North Hempstead* (Sup.) 30 N. Y. Supp. 128, said: "It is apparent that a bicycle rider upon an ordinary country road is exposed to greater dangers than a person riding in a wagon, * * * but under the present highway laws a road in a condition which is reasonably safe for general and ordinary travel is all that the commissioners of highways are bound to maintain." In *Leslie* v. *City of Grand Rapids*, (Mich.) 78 N. W. Rep. 885, the supreme court of Michigan has said: "Where a street is kept in a reasonably safe and fit condition for ordinary vehicles, such as wagons and carriages, a town is not liable for injuries received by one thrown from her bicycle by reason of its defective condition." The same court reaffirmed the doctrine of the last case in *Lee* v. *City of Port Huron*, 87 N. W. Rep. 637, and used this language: "Comp. Laws, § 3441, requiring sidewalks to be kept in reasonable repair, and in a condition reasonably safe for travel, only requires that a sidewalk shall be kept in such repair as to render it safe for ordinary uses, and does not mean that it shall be kept in a safe condition for bicycle riding, though a lawful city ordinance authorizes such use." In *Morrison* v. *City of Syracuse*, (Sup.) 61 N. Y. Supp. 313, the court said: "One injured while rightfully riding a bicycle on the sidewalk cannot recover, if the sidewalk was in a reasonably safe condition for pedestrians, though it was not in a reasonably safe condition for bicycle riding." In *Wheeler* v. *City of Boone* (Iowa) 78 N. W. Rep. 909, 44 L. R. A. 821, the court says: "One injured while riding a tricycle on a sidewalk can recover only if the city was negligent in failing to keep the walk in suitable condition for people to walk over," etc The instructions given by the trial court to the jury failed to inform the jury, directly or indirectly, that if the sidewalk in question was in a reasonably safe condition for travel by persons walking thereon, then the city would not be liable for plaintiff's injuries, caused while attempting to travel over the walk on his bicycle. Because the city has permitted the use of this street by persons riding a bicycle cannot be a ground for holding that such permission imposed upon the city additional responsibility to keep the walks in that extra good condition of repair required for safe travel by bicycle riders. It is well known that a higher degree of perfection in building and keeping sidewalks in repair would be required than at present if the city were compelled to keep the walks in condition for riding upon bicycles. A person riding a bicycle has a right to assume that the walk is in safe condition for pedes-

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trians to use, and, if he is injured when the walks are in such condition, he cannot complain, and he must bear the loss, as he assumed the risk. If not in such condition, he can recover for injuries, if he acted without contributory negligence.

For these reasons, the order is reversed, a new trial granted, and the cause remanded for further proceedings according to law. All concur.

(88 N. W. Rep. 1030.

JAMES B. EATON *vs.* THE GUARANTEE COMPANY OF NORTH DAKOTA.

Statutes—Title of Act—Constitutional Law.

Section 61 of the state constitution, and chapter 5, Laws 1901, construed, and *held* that the body of chapter 5 embraces but one subject, and *held*, further, that the subject of the act is expressed in its title.

Title of Act—Plurality of Subjects.

Where the subject of a statute is single, and the same is expressed in its title, the act will not be invalidated by the fact that the title announces a plurality of subjects.

Appeal from District Court, Bottineau county; *Cowan*, J.

Action by James B. Eaton against the Guarantee Company of North Dakota. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

E. Ashley Mears, for appellant.

James B. Eaton, for respondent.

WALLIN, C. J. This action is brought to quiet title, and the complaint alleges, in substance, that the plaintiff has a fee-simple estate in the land described in the complaint, and that the defendant claims to have a mortgage lien upon the land. For relief plaintiff asks that the defendant be required to set forth its adverse claims to the land, and, in substance, that it may be adjudged that the defendant has no title, estate, or lien upon the land in dispute. To this complaint a general demurrer for insufficiency was interposed by the defendant, whereupon the issue joined by the demurrer was presented to the district court for determination, and that court, after hearing counsel upon said issue, overruled the demurrer to the complaint, and from the order overruling the demurrer defendant has appealed to this court.

In this court counsel for the appellant makes two points in support of the demurrer. His first contention is that the statute under which the complaint was obviously framed is unconstitutional, and hence void; and this claim is based upon the ground that said statute violates the provisions of § 61 of the state constitution, which are

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as follows: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." Chapter 5, Laws 1901, in terms permits an action to quiet title as against an adverse lien as well as against an adverse estate or title in land. In assailing this statute counsel argue, in substance, that the act, in its body, embraces several distinct subjects, and that the title of the act is also obnoxious as expressing more than one subject. The title is as follows: "An act to provide for making unknown persons parties defendant in certain civil actions; and to amend § § 5904, 5905, 5906, 5907, 5907a, 5908, 5909, 5910, 5911, 5912, 5913, of the Revised Codes of North Dakota for 1899, relating to the determination of conflicting claims to real estate and other actions and enacting other provisions relating thereto." A perusal of the body of the act will disclose the fact that the same consists wholly of amendments of the several sections of the Revised Codes of 1899 which are expressly referred to in the title of the act; i. e., the body of the act amends and re-enacts the sections of the Code of 1899 which are named in the title. Such amendments introduce certain changes in the statute, and add a few provisions or features not found in the original enactment; but a careful perusal of the several amendments has failed to show that any new matter is incorporated in the amendments which is not germane to the subject of the original act. We have failed to discover that any foreign or extraneous subject has been smuggled into the statute under the guise of amendments, and hence we have reached the conclusion that the body of the amendatory act embraced in chapter 5, Laws 1901, contains but a single subject, which subject is cognate with that found in the original act. The section of the constitution relied upon by counsel has uniformly and very properly received a liberal construction at the hands of the courts; and this court quite recently, as well as in its earlier decisions, has applied this rule of construction. See *In re Kol,* 10 N. D. 493, 88 N. W. Rep. 273. Reverting to the title of chapter 5, supra, we shall, without deciding the point, concede, for the purposes of the case, that the title embraces more than one subject. This concession will go to the full length claimed by counsel with respect to his criticisms of the title. We are confronted, therefore, with a piece of legislation in which the body of the enactment contains but one subject, and in which the title (after properly expressing the subject of the act as found in the body thereof) proceeds to announce or express one or more additional subjects which are not embraced in the statute itself. Upon this state of facts the question is presented whether chapter 5, supra, violates the inhibitions found in § 61 of the state constitution. In our opinion, this question must receive a negative answer. As we interpret § 61, an enactment which in its body

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embraces but a single subject, which subject is expressed in its title, is not invalidated by the fact that the title expresses or announces a plurality of subjects. See 23 Am. & Eng. Enc. Law, 232; also *People* v. *Lawrence*, 36 Barb. 177. Our conclusion is that the point made against the constitutionality of the statute is untenable, and cannot, therefore, be sustained.

Counsel finally contends that under the amendatory act an action to quiet title as against an adverse lien may be maintained, whereas no such action could be maintained at the time the defendant obtained his mortgage on the land in suit. This change in the law is complained of by counsel apparently on the theory that a suitor has a vested and constitutional right in mere remedies whereby the rights of suitors are maintained in the courts. But this theory is untenable. The remedy, viz., the mode and manner of procedure in courts, is a matter within legislative control, and the same may at any time be modified or enlarged or diminished at the discretion of the lawmaker, provided always that the change in the remedy does not so operate as to cut off or abridge the substantial rights of the litigant. This rule is elementary. See Am. & Eng. Enc. Law (2d Ed.) page 753.

The order overruling the demurrer will be sustained. All the judges concurring.

(88 N. W. Rep. 1029.)

FRANK TALBOT *vs.* EDWIN L. BOYD.

Breach of Contract—Measure of Damages—Exchange of Property—Evidence.

Plaintiff and defendant entered into an agreement to exchange an equal number of bushels of wheat in February, 1898. The defendants' wheat being seed wheat, and the more valuable, plaintiff was to haul his wheat to the elevator, and deliver the storage tickets to defendant and was to pay storage charges until April 1st. Plaintiff was also to accept the seed wheat at defendant's residence, and haul the same to his own place. Plaintiff complied with all the terms of the agreement and demanded the seed wheat, which demand defendant refused to comply with, he having previously sold such seed wheat. *Held*, that the measure of damages for the breach of such contract would be the difference between the value of the seed wheat at the time and place it was to be delivered and the market value of plaintiff's wheat at the time of the refusal of the defendant to accept the tickets for the same.

Statutory Measure of Damage.

Held, that such damages are measured and determined under § 4985, Rev. Codes.

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Contract for Exchange.

Held, further, that under § 3997, Rev. Codes, the provisions of § 3958, Id., apply to contracts for exchange of property, where the value of the property to be exchanged by either party is $50 or more.

Same.

Held, also, that the measure of damages laid down in § 4985, Rev. Codes, applies to cases of breach of valid contracts of exchange of personal property.

Verdict Sustained by the Evidence.

Held, further, upon a review of the evidence, that the verdict of the jury upon the question of the making of a contract by the parties and the delivery of a part of the property agreed to be exchanged by said contract is sustained by the evidence.

Appeal from District Court, Nelson County; *Fisk*, J.

Action by Frank Talbot against Edwin L. Boyd. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Frick & Kelly, for appellant.

Fred A. Kelly, for respondent.

MORGAN, J. This action was commenced in justice's court. The plaintiff recovered judgment in that court and in the district court. The action is brought to recover damages for breach of a contract to exchange personal property. The facts as set forth in the complaint are the following: That on or about February 14, 1898, the defendant agreed with plaintiff to exchange 375 bushels of seed wheat, then on defendant's farm, for 375 bushels of wheat belonging to plaintiff of the grade of No. 1 hard wheat; that plaintiff agreed to deliver his wheat at the elevator at Aneta before April 1st of that year, and to procure storage tickets therefor, and turn them over to defendant before said date; that all storage charges on said wheat were to be paid by plaintiff; that at the time of such agreement the defendant delivered to plaintiff one-half bushel of the seed wheat to be exchanged; that under such agreement the plaintiff was to receive defendant's wheat at defendant's place whenever the storage tickets for plaintiff's 375 bushels of wheat issued by the elevator at Aneta should be turned over to defendant before April 1st; that plaintiff tendered to defendant such storage tickets for 375 bushels of No. 1 hard wheat, and demanded the delivery to plaintiff of the balance of the wheat on defendant's place so agreed to be exchanged by him; that defendant refused to turn over said wheat, disclaiming any obligation to do so, and stating that the same had been by him sold to another. Damages were claimed in the sum of $71.25. The answer is a general denial, with a statement, claimed as a defense, that the contract set forth in the complaint was within the statute of frauds, and therefore not valid, as there was no delivery of any

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portion of the property sold, nor any memorandum in writing as to the terms of the contract. The jury found a verdict in favor of the plaintiff for the sum of $60. On a motion for a new trial the trial court made an order granting a new trial and setting aside the verdict, unless plaintiff should remit all of said verdict except $30. The plaintiff so elected in writing, whereupon the motion for a new trial was denied. The appeal is from the order denying to grant the motion for a new trial. A statement of the case was settled, embodying all the evidence taken at the trial and a specification of the errorrs relied on for a reversal of that order. Four alleged errors are relied on in this court as the basis for obtaining a reversal of the order appealed from. We will notice them each in the order in which they are argued in appellant's brief.

First, it is claimed that the evidence fails to show that a contract was entered into. We have examined all of the evidence bearing on this as well as the other assignments of error. Whether a contract was entered into between the parties in relation to the wheat in question was a question concerning which the parties differed. There was a conflict in the evidence as to this point. According to plaintiff's testimony, the contract was complete and unconditional, and mutually agreed upon by the parties some time in February, 1898, and part of the wheat then delivered thereunder. He was corroborated by another witness, who was present during the negotiations. Whether the contract was actually entered into by the parties or not was submitted to the jury under proper instructions to the effect that, if not entered into as claimed by the plaintiff, he could not recover. The verdict of the jury in plaintiff's favor was supported by a clear preponderance of the evidence, and is therefore amply sustained by the evidence. It would result in no benefit to any one for us to discuss or review in detail the evidence bearing on this point.

The next error claimed is that the evidence does not establish that the plaintiff has been damaged in any way by reason of the refusal of the defendant to comply with the contract. This alleged error is based upon the theory that there is no evidence in the record as to the value of the wheat delivered by the plaintiff at the elevator at the time when the plaintiff tendered the tickets to the defendant. The time when the tickets were so offered to the defendant has not been precisely fixed by the witnesses for the plaintiff. The defendant testifies that they were tendered on March 1st. The plaintiff testifies that it was early in March. It was for the jury to determine on what day the tender was made. Whatever the day in March, the evidence showed what the market value of such wheat was, both at Lakota and at Aneta, during all of March after the 3d thereof; and, the jury having passed upon the question, and assessed the damages, our inquiry is directed solely to a determination of the question whether there is any evidence to support

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such verdict. A reading of the testimony of the elevator agent convinces us that the verdict is sustained by competent and relevant evidence. In this connection it should be stated that the question of the insufficiency of the evidence to support the verdict was not raised by a motion for a directed verdict at the close of the taking of the testimony. Such a motion was made and denied at the close of the testimony on behalf of the plaintiff, but such motion was not renewed at the close of the testimony in the case, and is therefore conclusively deemed to have been waived. *Colby* v. *McDermont,* 6 N. D. 495, 71 N. W. Rep. 772; *Bowman* v. *Eppinger,* 1 N. D. 21, 44 N. W. Rep. 1000. It is claimed that the jury were erroneously instructed upon the measure of damages to be followed by them in assessing damages if they should find for the plaintiff. The instruction complained of is the following: "In case you find for the plaintiff, your verdict will be for such amount as you will find to be the difference, if any, between the value of the 375 bushels of seed wheat at the time and place it was to be delivered and the value at Aneta of the 375 bushels of wheat which was on deposit in the elevator at said date, together with interest thereon at the rate of 7 per cent. per annum from said date." The trial court treated the plaintiff as the buyer of the seed wheat and the defendant the seller. This was proper. Section 3998, Rev. Codes. He was the party who was to receive the seed wheat. As to the other wheat the defendant was the buyer. Section 3998 governs as to this question of buyer and seller in case of exchange of personal property. Under § 4985, Rev. Codes, the instruction was a proper rule as to the measure of damages under the evidence. Said § 4985 is as follows: "The detriment caused by a breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled." The evidence shows that the value of the seed wheat at the time and place when it was to be delivered to the plaintiff was 90 cents per bushel. The evidence also showed that the value of No. 1 hard wheat at Aneta on and from March 4th to March 31st ranged from 81 to 86 cents per bushel. The difference between 90 cents, the value of the seed wheat, and whatever sum was found as the market value of plaintiff's wheat during that time, would represent plaintiff's damage growing out of defendant's refusal to comply with the contract. Had the plaintiff and defendant entered into a valid contract under which the plaintiff was to purchase such wheat for a cash price, and defendant had refused to deliver the seed wheat, the measure of damages would have been the same. But in that case the cash price agreed on would have been a fixed sum, and would have fixed the sum due the defendant under the contract. In this case that which was agreed to be paid for the seed wheat was a

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commodity,—that is, an equal number of bushels of No. 1 hard wheat,—and before it could be ascertained what would have been due the defendant under the contract in case of a breach of the contract the value in money of the wheat that the plaintiff was to deliver to the defendant must be determined, and this was what was done in this case. The instruction given was a correct statement of the law applicable under the evidence. The action was brought to recover damages for a refusal to comply with a contract of exchange of personal property. This case is equivalent to an action for damages for breach of a contract to sell personal property not paid for, and damages are to be measured by said § 4985. 11 Am. & Eng. Enc. Law (2d Ed.) p. 571. Damages under § 4988, Rev. Codes, are recoverable when there is a breach of an agreement to buy personal property.

It is urged that the contract was within the statute of frauds, and therefore not an enforceable contract, for the reason that no part of the seed wheat was delivered when the contract was entered into, and no part of the purchase price paid. It is claimed that the one-half bushel was delivered as a sample, with which the quality of the wheat was to be tested, and this one-half bushel then returned. The plaintiff claimed in his evidence, and was corroborated by another witness, that the one-half bushel was delivered to be retained by plaintiff, and that it was distinctly understood and stated between them when the contract was made that it was not to be returned to defendant, but was accepted as a part of the 375 bushels to be delivered later. These conflicting claims were submitted to the jury for determination under instructions that, if the plaintiff's claim was true, the contract was valid, and enforceable, and that if the defendant's claim was true, the contract was not valid, and plaintiff could not recover if they found the defendant's contention sustained by the evidence. Under § 3958, Rev. Codes, the delivery to the buyer of a part of the property sold at the time of the contract to sell renders the contract valid to the same extent as though he pays a part of the purchase price at such time. The passing of a consideration—that is, a part of the property or a part of the price—between the parties renders the contract valid and enforceable as to both, and the provisions of the statute are satisfied, and the fact that it was not in writing cannot be properly urged. Benj. Sales (6th Ed.) p. 163. Under the statute (§ 3997) the same rules are applicable in contracts for exchange of personal property as in contracts to sell for money so far as the statute of frauds is concerned. The same rules are also applicable so far as damages recoverable are concerned. Section 3998, Rev. Codes; *Dowling* v. *McKenney,* 124 Mass. 478.

The motion to strike out all of the testimony of the witness Tanton was properly denied. The ground was urged against such testimony that it did not tend to show the price of wheat at Aneta,

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but at Lakota only, and that his testimony only covered a portion of the month of March. In the first place, the testimony was not objected to on these grounds, nor did the motion to strike out the testimony specify these objections as grounds for striking it out. We have read the testimony, and find that it related to the price of wheat at Aneta generally, as compared with the price at Lakota, which included the month of March on and after the 4th thereof. It was not error to refuse to strike this testimony from the record.

This disposes of all the errors assigned, and it follows that the order appealed from is affirmed. All concur.

(88 N. W. Rep. 1026.)

S. L. GLASPELL *vs.* THE CITY OF JAMESTOWN.

Constitutional Law—Legislative Powers.

Sections 2440, 2441, Rev Codes, authorizing district courts to exclude territory from the corporate limits of cities in certain cases, are unconstitutional for the reason that they vest legislative powers in the courts.

Appeal from District Court, Stutsman County; *Lauder*, J.

Action by S. L. Glaspell and others against the city of Jamestown for the purpose of excluding certain real estate from the corporate limits of the city. Judgment for plaintiffs, and defendant appeals. Reversed.

George W. Thorpe, for appellant.

F. Baldwin and *Jas. A. Murphy*, for respondents.

MORGAN, J. This appeal is from a judgment of the district court of Stutsman county excluding and disconnecting certain lands from the corporate limits of the city of Jamestown. The proceeding which resulted in said judgment originated in the filing of a petition in the office of the clerk of the district court of said county after a similar petition had been presented to the city council of the city of Jamestown, and such council had refused to grant the prayer of the same. The petition as filed in the office of the clerk of the district court contained a statement of the following facts, viz.: (1) That the petitioners are the owners of the lands therein described; (2) that petitioner Smith and one Dunsmore are the only legal voters residing on said lands; (3) that no part of said territory is platted or laid out into lots or blocks, and that the same is on the border and within the corporate limits of the city of Jamestown; (4) that said territory is composed of farming and pasture land, and is not benefited in any way by being within the limits of said city; (5) that petitioners did present their petition in writing

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to the city council of the city of Jamestown, praying that said land be excluded from the limits of said city, but the said petition was without cause and unjustly denied on February 14, 1900. Upon due notice to the city, the matters involved were duly brought before the court for determination. The city first filed objections to the jurisdiction of the district court to determine the matters involved, for the reason that the relief asked is exclusively vested in the powers of the legislature and city council, and is not, and cannot be, vested in or conferred upon the courts. This motion or objection was denied. A demurrer to the petition was then interposed upon the same grounds, and overruled. Exceptions to such rulings were saved by the city. Thereupon a hearing upon the merits was had, after which the trial court made findings of fact and conclusions of law, and ordered that judgment be entered granting the prayer of the petitioners. The court found all the facts alleged in the petition to be true, and, as conclusions of law, found "that the request of the petitioners ought to be granted, and can be so granted without injustice to the inhabitants of said city and territory, or of any person interested." From the judgment entered by the trial court excluding these lands from the corporate limits of the city of Jamestown, the city has appealed.

In this court it is contended that the law under which the court is authorized to act in relation to changing the boundaries of cities or villages is unconstitutional, as vesting in such court powers that are strictly legislative, and not judicial. Before considering the question thus raised, it becomes necessary to state the provisions of the statute and the provisions of the state constitution having any bearing on that question. Under chapter 28, Pol. Code 1899, the organization of cities is provided for by a general law. Section 2438, Rev. Codes provides that the corporate limits of a city may be restricted and territory disconnected therefrom by the city council, upon filing with said council a petition signed by not less than three-quarters of the legal voters, and by the owners of not less than three-quarters in value of the property, in any territory within any incorporated city, and being upon the border and within the limits of said city, providing that said lands have not been laid out into city lots or blocks. Section 2439, Id., provides that no final action shall be taken by the city council upon such petition unless notice of the presentation of such petition shall have been published for at least two weeks in some newspaper of the city. Section 2440 provides that in case of the refusal of the city council to grant such petition, or in case of its failure to act thereon for 30 days after such publication shall be completed, the petitioners may present their petition to the district court of the county by filing the same with the clerk of the district court. Notice of such filing shall be served upon the mayor of the city, together with a notice of the time and place of the hearing upon such petition before the court.

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Section 2441 is as follows: "If upon the hearing the court shall find that the request of the petitioners ought to be granted and can be so granted without injustice to the inhabitants or persons interested the court shall so order. If the court shall find against the petitioners the petition shall be dismissed at the cost of the petitioners." No question is raised as to the regularity of all the proceedings up to and including the presentation of the petition to the district court. The following provisions of the state constitution are deemed to have direct application to the question at issue: The constitution vests all governmental power in three departments,—executive, legislative, and judicial. Section 130 provides that the district courts shall have original jurisdiction, except as otherwise provided in the constitution, of all causes, both at law and equity, and such appellate jurisdiction as may be conferred by law. They and the judges thereof shall also have power to issue, hear, and determine writs of habeas corpus, quo warranto, certiorari, injunction, and other original and remedial writs. Section 25: "The legislative power shall be vested in a senate and house of representatives." Section 69: The legislative assembly shall not pass local or special laws pertaining to the "incorporation of cities, towns, villages or changing or amending the charter of any town, city, or village." Section 130: The legislative assembly shall provide by general law for the organization of municipal corporations. The single question is presented whether § 2440, supra, delegates to the district courts powers that are not judicial.

It is conceded that, if the power conferred by that section is not judicial, the law is repugnant to the constitution, and therefore void. In other words, it is undisputed that the delegation of legislative functions to the district courts is not contemplated by the constitution, and that the three departments of government provided for in the constitution are distinct from each other; the powers of each being therein separately defined. It is therein provided that the executive department shall enforce the laws, the legislative department shall enact, repeal, or amend the laws, and the judicial department shall construe them. It is a fundamental principle of law, and recognized by § 130 of the constitution of this state, that the creation of municipal corporations is a legislative function. Such corporations are created pursuant to legislative enactments only. Dill. Mun. Corp. § 37; Cooley Const. Lim. (5th Ed.) p. 228. To further their creation in states where special legislation is prohibited, certain acts relative to their creation may be delegated by the lawmakers to be done or performed by local municipal bodies. In these cases it is deemed, nevertheless, that the performance of such acts is not the creation of the corporation. The law does that, and the organization is deemed to be perfected or created by the law upon the performance of such act by the body to which the performance of such act is delegated. *People* v. *Burr*, 13 Cal. 358. So, also, may the legislature enact a law to become operative upon the

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happening of certain conditions, and the determination whether such conditions exist may be left to be determined by a specified body in a specified manner. *State* v. *Simon*, 32 Minn. 540, 21 N. W. Rep. 750. Such an act is performed by the board of county commissioners in relation to the incorporation of cities, in this state, when such board, upon being petitioned, calls an election and appoints judges of elections in order that the inhabitants may vote upon the question of the incorporation of the city. Section 2339, Rev. Codes. This is not deemed a legislative function, but the delegation of authority for the determination of the fact of the consent of the inhabitants, which must pre-exist before incorporation as a city is possible. In the case before us no question of the incorporation of a city is involved. Before these proceedings were commenced, the city of Jamestown was duly incorporated as a city, and its corporate limits duly defined. This proceeding contemplates a change in such corporate limits. Such change of corporate limits is effectuated under the application of no different principles than the organization of the corporation originally; that is, similar tests or reasons are to be used in determining whether such change of boundaries is advisable as in the case of the organization of the corporation originally. The welfare of the inhabitants should be consulted in each instance.

In this case the decision must turn upon the question whether the duty devolving upon the court, of determining whether such territory ought to be excluded from the corporate limits, and whether the petition can be granted without injustice to the interested parties, be a judicial or a legislative power. If a decision of the matters prayed for in the petition involved decisions of questions of fact only, then the power conferred upon the court would be judicial. The facts to be found relate to the character of the land; its location, occupancy, ownership; benefits accruing by being within the corporate limits; burdens upon it by reason of city taxation; the presentation of a petition to the city council; the refusal of the city to grant it; publication and service of notices; and whether the proceedings were in all things regular. Passing upon these questions and making findings of fact thereon would involve the exercise of judicial power. Having made such findings, the duty of the court, as prescribed by the law, is not fully performed in relation to the matter. The court must proceed further, and determine whether the petition "ought to be granted and can be granted without injustice" to the interested parties. It is apparent that such a determination goes further than the mere finding of a fact. It involves the reaching of a conclusion from the facts found as to the policy of restricting the corporate limits of the city,—not only the policy for the present but for the future. It determines the limits of the city; the jurisdictional limits of its courts, and taxation powers; the effect upon its schools and people; and, in short, determines

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the same identical questions of public policy involved always in the exercise of legislative duties or powers. When exercised as to the organization of cities, it determines whether the charter shall be amended in the matter of boundaries; it determines whether the boundaries of the city shall be changed,—something that can be done in no other way, under present laws, than by the passage of an ordinance. This seems to us to involve the exercise of what is clearly legislative discretion. It is more than the finding of facts. It necessarily compels the finding of conclusions,—not conclusions as to the law applicable, but conclusions as to the wisdom or policy of the relief sought. Whether such action is expedient is necessarily involved. Such duty requires to be done more than is included in the ordinary and accepted meaning of a judicial act,—a determination of what the existing law is in relation to some existing thing already done or happened. It falls within the definition of legislative action, viz., a predetermination of what the law shall be, for the regulation of all future cases falling under its provisions. Cooley, Const. Lim. (5th Ed.) pp. 109, 110. As was said by the supreme court of Illinois in *City of Galesburg* v. *Hawkinson*, 75 Ill. 152: "If the boundaries of municipal corporations can be altered and changed by the legislature in its discretion,—and the authorities are all that way,—then it is impossible that the courts can be invested with such power. Courts may determine what are the corporate limits already established, they may determine whether what is claimed by the municipal authority to be corporate limits is so or not, and they may inquire whether the legislative authority has exceeded the powers with which it is invested; but all this implies an existing law, applicable to the particular subject, and the inquiry is, what is the law, and has it been violated or complied with? Here, however, the inquiry is, what shall the law be, as respects the boundaries of the city? Shall it be as designated by the charter, or shall it be as prayed by the petitioners? And the decree of the court is the answer. That decree assumes to be, not a declaration of rights under the law, but the law itself, amending and changing a previous statute as to the extent of territory over which a particular municipal government shall obtain." The supreme court of Wisconsin said, in deciding whether the creation or organization of a municipal corporation is a judicial act: "Furthermore, the provision authorizing the court to enlarge or diminish the boundaries of the village as justice may require seems to be as equally an exercise of legislative power. It is vigorously claimed by the respondents that these last-named questions are in truth questions of fact only but it seems to us that this claim is utterly untenable. There is no proper sense in which they can be said to be questions of fact. They are, rather, conclusions from all the facts. Given all the facts which the legislature require,—the area, the population, the census, the map, the notices,—and does the order calling for an election follow?

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By no means. The circuit court, in addition to determining these facts, must then say whether, in its judgment, it is best that there should be a village. * * * The question as to whether incorporation is for the best interest of the community in any case is emphatically a question of public policy and statecraft,—not in any sense a judicial question." *In re Village of North Milwaukee,* (Wis.) 67 N. W. Rep. 1033, 33 L. R. A. 638. The supreme court of Minnesota, speaking through Judge Mitchell, said in reference to the organization of villages through orders of court: "It will be observed that the duty of the court is not simply to inquire and ascertain whether certain specified facts exist or whether certain specified conditions have been complied with, but to proceed and determine whether the interests of the inhabitants will be promoted by the incorporation of the village, and, if so, what land ought, in justice, to be included within its limits. In short, it is left to the court to decide whether public interests will be subserved by creating a municipal corporation, and the determination of this question is left wholly to his views of expediency and public policy. * * * But the present act assumes to delegate these legislative powers to the district court,—a tribunal not authorized to exercise them; its jurisdiction, under the constitution, being purely judicial." *State* v. *Simons,* 32 Minn. 540, 21 N. W. Rep. 750. The following cases also sustain the view that such powers cannot be delegated to the courts: *Territory* v. *Stewart,* (Wash.) 23 Pac. Rep. 405, 8 L. R. A. 106; *People* v. *Carpenter,* 24 N. Y. 86; *Powers* v. *Commissioners,* 8 Ohio, St. 285; *Bristol* v. *Town of New Chester,* 3 N. H. 524; *City of Philadelphia* v. *Fox,* 64 Pa. 169; *Morton* v. *Dicks,* (Miss.) 24 Am. Rep. 661; *People* v. *Bennett,* 29 Mich. 451, 18 Am. Rep. 107.

It is true that there is great conflict in the decisions of courts of last resort upon this question. The supreme courts of Kansas, Iowa, Nebraska, and South Dakota, notably, are able exponents of conclusions reached opposite to that of ours. Some of these courts hold that the questions passed upon are those of fact or conditions, and not of policy, and therefore judicial. As seen, we do not concur in that view. Others deem the duty of the court to be a review of the action of the council, and, as such, strictly judicial action. Strictly, the court proceeding is not a review of the action of the council, although bringing the matter before the council is a condition precedent to an application to the court. Conceding, however, that the proceedings in court involved a review, only, and an approval or disapproval, of the action of the council, still the objection is not removed. The same discretion or judgment must be exercised as to the political wisdom or policy of granting or refusing the petition as though the proceedings were originally instituted in the district court. Administrative or legislative bodies are not permitted to interfere with the judgments of courts. Courts

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are likewise enjoined from interfering with or reviewing the matters properly before or determined by legislative bodies, including city councils, in matters involving political discretion or judgment. It would not be contended, under any circumstances, that the wisdom of a law enacted by the legislature could be successfully attacked in the courts. Equally is such review enjoined as to the policy or wisdom of the enactments of city councils or county boards as to matters properly before them. It is claimed that courts are not prohibited from exercising their powers in cases pertaining to municipal corporations that involve only matters that are prohibited as special legislation. No authority is cited in support of this contention. On principle, we do not think the contention sustainable. Matters pertaining to or classed as special legislation involve the exercise of judgment and discretion. The exercise of the power is not judicial in either case.

It is insisted with much force that petitioners are left without a remedy if this proceeding cannot be sustained. The matter is a proper matter for determination by the council. It does not follow—anyhow, it should not follow—that a city council will refuse to grant meritorious petitions because of bias or interest in the city's favor. However, it is a matter for legislation, if present enactments are not adequate to insure relief in a tribunal clothed with rightful power to determine the matters.

The judgment is reversed, and the district court directed to dismiss the petition. All concur.

(88 N. W. Rep. 1023.)

ALLAN WILSON *vs.* JOHN KARTES.

Appeal—Assignment of Errors.

Appellant having wholly failed to assign errors in his brief as provided by rule 12 (6 N. D. xviii) of the rules of this court, and the record showing no reason for relaxing the rule, the order appealed from is affiirmed.

Appeal from District Court, Cavalier County; *Kneeshaw*, J.

Action by Allan Wilson against John Kartes. Judgment for plaintiff. From an order denying a new trial defendant appeals. Affirmed.

Monnet & Lamb and *Gordon & Lamb*, for appellant.

Dickson & Dickson, for respondent.

MORGAN, J. This is an action in claim and delivery, brought to recover possession of a bull claimed to be unjustly detained by the defendant. The issues raised by the pleadings were submitted to

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a jury, and a verdict in favor of the plaintiff was rendered. A motion for a new trial was duly made, based on a statement of the case duly settled, and the motion denied. Judgment was entered on the verdict. The defendant appeals to this court from such order denying a new trial.

The appellant has wholly failed to comply with the rules of this court in relation to making and subjoining to his brief assignments of error, as prescribed by rule 12 (6 N. D. xviii) of the rules of this court. The requirements of this rule are wholly disregarded, and there is a total failure to assign any errors under such rule, or in any other manner. That it is necessary, in cases tried before a jury to assign errors in the brief as prescribed by such rule, has been so often held by this court that further statement of the reasons on which the rule is based is unnecessary. *O'Brien* v. *Miller*, 4 N. D. 108, 60 N. W. Rep. 841; *Hostetter* v. *Elevator Co.*, 4 N. D. 357, 61 N. W. Rep. 49; *Brynjolfson* v. *Thingvalla Tp.*, 8 N. D. 106, 77 N. W. Rep. 284; *Investment Co.* v. *Boyum*, 3 N. D. 538, 58 N. W. Rep. 339. It is true that this court may, under the terms of the rule, if in furtherance of justice, relax the rule, and review the record, and determine whether prejudicial errors occurred at the trial. On examination of the record we are convinced that no grounds exist, justifying a relaxation of the rule.

The order is affirmed. All concur.

(88 N. W. Rep. 1023.)

SILAS W. PRESCOTT *vs.* GEORGE BROOKS.

Appeal—Time of Taking—Retrial—Jurisdiction.

Section 5605, Rev. Codes, which limits the time in which an appeal may be taken to the supreme court from judgments rendered in actions wherein the parties against whom the judgments are entered have appeared to one year "after written notice of the entry thereof," construed. *Held*, that the written notice of the entry of judgment required by said section to set the time for appeal running in order to be available against an appellant must be served upon such appellant by his adversary, and that service by an appellant upon the respondent does not operate to limit appellant's time for appeal. Section 5630, Rev. Codes, and the statutes amended thereby, introduced a new method of trial and appeal in actions tried in the district courts without a jury, and as to appeals taken thereunder imposes duties upon this court entirely unlike those created by the general appeal law. Upon appeals taken for the purpose of securing a retrial under said section, this court is required to make a final disposition of the case, except when, for the accomplishment of justice, a new trial shall be ordered. It follows necessarily that the only retrial authorized by said section is upon an appeal from the entire judgment and a complete transference of jurisdiction of the case to this court. It is accordingly *held*, that defendants' appeal, which is from a portion of a judgment,

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and is accompanied by a request for a retrial of only a portion of the case, does not confer jurisdiction upon this court to enter upon a retrial under said section, and the same is therefore dismissed. Wallin, C. J., dissenting as to grounds of dismissal.

Appeal from District Court, Pembina County; *Fisk*, J.

Action by Silas W. Prescott against George Brooks. Judgment for plaintiff, and defendant appeals. Dismissed.

Cochrane & Corliss, for appellant.

When a mortgage is executed as security for money due or to become due on a promissory note, bond or other instrument designated in the mortgage ,the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them or either of them to the person holding such note, bond or other instrument. § 4717 Rev. Codes. The implication from the statute is that the recording of the mortgage shall be notice, if the original payee no longer holds the note, bond or other instrument. *Rogers* v. *Peckham*, 52 Pac. Rep. 483. This appeal is from a divisible judgment consisting of two parts; one part adjudging the validity of the $880 mortgage and decrees the foreclosure thereof; the other adjudges the payment of the $500 mortgage and decrees the satisfaction thereof. There is nothing in our statute or system of procedure which does away with or calls for any modification of the settled rule, applicable alike to appeals in equitable as well as in legal actions, that, upon an appeal by one party from a distinct portion of the judgment, the respondent cannot ask for a review of either portion of the judgment adverse to him from which he, himself, does not appeal. *Mackall* v. *Mackall*, 135 U. S. 167-170; *Winslow* v. *Wilcox*, 105 U. S. 447; *Chittenden* v. *Brewster*, 2 Wall. 191; *Clark* v. *Killian*, 103 U. S. 766; *U. S.* v. *Blackfeather*, 155 U. S. 180; *Building and Loan Assn.* v. *Logan*, 66 Fed. Rep. 827; *Mapes* v. *Coffin*, 5 Paige, 296; *Kelsey* v. *Western*, 2 N. Y. 501-505; *Schlawig* v. *De Peyster*, 49 N. W. Rep. 843; *In re Stumpenhouse Estate*, 79 N. W. Rep. 376; *Matthews* v. *Imperial Acct. Assn.*, 81 N. W. Rep. 484; *Sabin* v. *Burke*, 37 Pac. Rep. 352; *Poe Mut. Life Ins. Co.* v. *Fisher*, 39 Pac. Rep. 758; *Goldsmith* v. *Elwert*, 50 Pac. Rep. 867; *Hoslam* v. *Hoslam*, 56 Pac. Rep. 243; *Cox* v. *Stokes*, 51 N. E. Rep. 316; *Sanitary Dist.* v. *Adams*, 53 N. E. Rep. 743; *The Stebben Morgan* v. *Good*, 94 U. S. 599; *May* v. *Gates*, 137 Mass. 389; *Morse* v. *Smith*, 83 Ill. 396; *Talcott* v. *Noel*, 78 N. W. Rep. 39-41; *Buck* v. *Fitzgerald*, 54 Pac. 942; *Phillips* v. *Reynolds*, 55 Pac. 316; 2 Beach Mod. Eq. Pr. § 935 and cases; *Phoenix Ins. Co.* v. *Ward*, 26 S. W. Rep. 762; *Bank* v. *Babbitt*, 13 S. E. Rep. 177-179-180.

W. H. Standish, for respondent.

Where the appellant, himself, draws up and enters an order he has notice in fact of the order at the time he so enters the same. It

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is not necessary for the adverse party to give him formal notice to limit his right of appeal. *Coal Co.* v. *Dyett,* 4 Paige Ch. 273; *Jenkins* v. *Wilds,* 14 Wendall, 544. The Appellate Court cannot relieve appellant from the effect of misfortune, accident or mistake unless the statute expressly authorizes relief; therefore, the appellant's right to appeal lapses with the expiration of the statutory period. 2 Enc. Pl. & Pr. 245. The burden of proof to show legal service for appeal is on appellant. *State* v. *Johnson,* 109 N. C. Rep. 853; *Finlayson* v. *Am. Acct. Co.,* 109 N. C. 196. Also to show that proper filing was made. *Attoway* v. *Goldsmith,* 18 S. W. Rep. 604; *Tootle* v. *French,* 2 Idaho, 744. Where the statute requires an appeal to be perfected within a prescribed period it is jurisdictional and the transcript must be filed within the time expressed or the appeal will be dismissed. 2 Enc. Pl. & Pr. 277. *Chamberlain* v. *Hedges,* 73 N. W. Rep. 75. In cases tried to the court under § 5630, Rev. Codes, it is not legally permissible to appeal from a part only of the judgment; it must be taken from the entire judgment in all cases. *Barkley* v. *Logan,* 2 Mont. 296; *Plaisted* v. *Nawlan,* 2 Mont. 359; *Hines* v. *Hines,* 84 N. C. 122; *Arrington* v. *Arrington,* 91 N. C. 310; *Thompson* v. *Thompson,* 23 Wis. 624; *Murphy* v. *Spaulding,* 46 N. Y. 556; *In Re N. Y. etc. Ry. Co.,* 44 Hun. 275; *Bennett* v. *Van Sycle,* 18 N. Y. 481; *Taylor* v. *Taylor,* 5 N. D. 58.

YOUNG, J. Plaintiff instituted this action for the purpose of determining the amount due on his two promissory notes, secured by mortgages in favor of one S. W. McLaughlin, upon a tract of land situated in Pembina county. The mortgage first executed secured a principal note for $500, with interest coupons thereto attached. This mortgage was executed on December 2, 1887. The other mortgage was given on December 9, 1889, and secured the payment of a principal note of $880, with interest coupons attached thereto, and covered the same land. Both notes were non-negotiable. The last, or $880, note was given by plaintiff to pay the $500 note. The excess above the amount due on the $500 note was paid to plaintiff by McLaughlin in cash, but the latter did not cancel the $500 note, or release the mortgage securing the same. McLaughlin assigned both mortgages to other parties. The $500 note and mortgage were transferred to one Helen M. Andrews, and the $880 note and mortgage to the defendant George Brooks. Both were made defendants in the action. No objection was made by either party to the form of the action or to their joinder as defendants. They answered separately, and demanded judgment for the full amount secured by their respective mortgages and a foreclosure of the same. Plaintiff claims that he should have credit for the $500 which was not paid to him from the $880 loan, and demands that the same be credited either upon the $500 note or the $880 note. Helen M. Andrews alleged in her answer that the $500 note had not been paid, and that the mortgage securing the same was a first lien on the premises for the full

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amount of the note with interest. Defendant Brooks, in his answer, denied that the $500 note had not been paid, and alleged that S. W. McLaughlin was the agent of Helen M. Andrews for the collection of the $500 note, and that "said mortgage and note alleged to be held by said defendant Helen M. Andrews was fully paid to said S. W. McLaughlin on or about December 9, 1889," which was the date of the execution and delivery of the $880 mortgage, and asked that his $880 mortgage be declared a first lien on the premises, and that the Andrews mortgage be declared paid and canceled. After issue was joined, but before trial, the defendant Brooks purchased the $500 note, and took an assignment of the mortgage securing the same, so that when the case came to trial he was the owner of both mortgages. The pleadings, however, were not amended. The case was tried to the court without a jury, under the provisions of § 5630, Rev. Codes 1899. The trial court sustained the allegations contained in the answer of Brooks, and found, as a conclusion of law, "that the giving of the $880 note by the plaintiff to the said S. W. McLaughlin paid and satisfied the said $500 note and mortgage aforesaid, and that plaintiff was entitled to judgment canceling said note and mortgage," and that defendant Brooks is entitled to "the usual decree of foreclosure and sale on the said $880 note and mortgage," etc. In accordance therewith a judgment and decree of foreclosure was entered as to the $880 note and mortgage, which judgment also declared the $500 note and mortgage null and void, and directing their cancellation. The defendant Brooks now seeks a review of the case in this court with respect to the $500 note and mortgage purchased during the pendency of the action. To this end he caused a notice of appeal to be served on plaintiff, specifying an appeal from that particular portion of the judgment, and also caused a statement of the case to be settled, containing all of the evidence offered at the trial, and containing a "specification of the questions to be tried in the supreme court," in which he "specifies that he desires the supreme court to review the entire case with respect to the $500 note and mortgage held by the defendant Andrews at the time of the commencement of this action, and assigned to the defendant Brooks by defendant Andrews during the pendency of this action, and with respect to the counterclaim set up in the answer of the defendant Andrews upon said note and mortgage, and praying for the foreclosure thereof; said defendant specifies that he desires the supreme court to review the question whether said mortgage has ever been paid. * * *"

Before the case was submitted to this court on the merits, counsel for the plaintiff made a preliminary motion to dismiss defendant's appeal, upon the ground that the appeal was not taken within the time allowed by law, in this, that "the notice of entry of judgment was served on plaintiff's counsel on August 4th, 1900, and no appeal notice or appeal bond was filed in the district court of Pembina county until August 7th, 1901." This motion must be denied. The

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facts as to the service of notice of the entry of judgment and filing of notice of appeal and undertaking are as stated in plaintiff's motion. But it will be noted that the service of the notice of entry of judgment relied upon was made by appellant upon respondent, and not by respondent upon the appellant. In fact no notice of entry was served by respondent, and he has taken no steps to limit the time in which appellant might avail himself of his right to appeal. The time within which appeals may be taken to this court is regulated by § 5605, Rev. Codes, which reads as follows: "An appeal from a judgment may be taken within one year after the entry thereof by default, or after written notice of the entry thereof in case the party against whom it is entered has appeared in the action, and from an order within sixty days after written notice of the same shall have been given to the party appealing. * * *" This not being a judgment by default, an appeal could be taken by a party desiring to appeal therefrom at any time prior to the expiration of the one-year period allowed, after written notice of the entry thereof. It will also be noted that as to this judgment the time for appealing did not begin to run from its rendition, nor from its entry; neither did it begin to run from actual notice or knowledge of the entry of the judgment. The language of the statute is explicit. It grants a period which does not expire until one year after written notice of the entry of the judgment in which to appeal. This statute places it in the power of either party to a judgment to set the time for an appeal running against his adversary, by serving upon him a written notice of entry of judgment. But it is clear that by serving such notice a party does not set the time running against himself, and thus limit his period for appealing. His service of notice is to cut off his adversary's time for appeal. So far as we are able to learn, there is entire harmony in the decisions of courts of last resort in construing statutes like that now under consideration, and the conclusion is general that an appellant's time for appeal can be cut off or set running only by service of written notice upon him, and that does not commence to run against him by his service upon his adversary. Section 9, Ch. 264, Laws Wis. 1860, provided that appeals from orders might be taken "within 30 days after written notice of the making of the same." The supreme court of that state, in construing this provision in *Corwith* v. *Bank*, 18 Wis. 563, 86 Am. Dec. 793, said: "We think it is very clear, from the language here employed, that it was not the intention of the legislature to limit the right of appeal from an order to the period of thirty days from the time the party whose rights are adversely affected by it has notice or knowledge of the entry of the order; for if this were the real object and intent of the statute, then it might with propriety be held that verbal notice, or the fact that the party was in court when the order was announced, would be sufficient. But the statute

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requires that, in order to limit the time for appealing, written notice must be given of the entry of the order. This is a limitation upon the right of appeal, and the prevailing party can set the statute running against his adversary by giving the written notice prescribed therein. He has the whole matter under his control, and can set the statute running when he pleases. The corresponding provision of the New York statute is substantially the same as § 9. In *Rankin* v. *Pine,* 4 Abb. Prac. 309, this precise question was presented to the supreme court of the Second district at general term. It was there held that the service of written notice of a judgment or order, in order to limit the right of appeal by the expiration of thirty days (as contemplated by § 332 of the Code of that state), is necessary, even when the appeal is taken from a judgment or order entered by the appellant himself. And when we consider the whole statute, and have regard to the principle that the right of appeal is favored by the courts, we are satisfied that this construction is the one to be adopted. The cases of *Fry* v. *Bennett,* 7 Abb. Prac. 352, *Leavy* v. *Roberts,* 8 Abb. Prac. 310, *Starling* v. *Jones,* 13 How. Prac. 423, and *Sherman* v. *Wells,* 14 How. Prac. 522, will be found to have a strong bearing upon the point we have been considering." See, also, *Kilmer* v. *Hathorn,* 78 N. Y. 228; *Champion* v. *Society,* 42 Barb. 441; *Livingston* v. *Railroad Co.,* 60 Hun. 473, 15 N. Y. Supp. 191. It is just to counsel for plaintiff to say that since making his motion to dismiss he has filed a brief stating that after a careful review of the authorities he has concluded that his motion to dismiss cannot be sustained.

We have reached the conclusion, however, that the retrial which defendant seeks cannot be accorded, for fatal jurisdictional reasons. The case was tried to the court without a jury under § 5630 of the Revised Codes of 1899, and the sole purpose of this appeal is to secure a retrial under said section. The defendant has appealed from only a part of the judgment, and seeks a review in this court of only that portion of the case which pertains to the part of the judgment appealed from. In other words, appellant presents a fragment of a case for our consideration, and asks us to retry that fragment, and finally dispose of the same entirely independent of the remaining portions of the judgment, which, if the position of counsel is sound, remains intact in the district court, unaffected by this appeal. Counsel for appellant state their position in their brief as follows: "With that portion of the judgment which adjudges that the $880 mortgage is valid, defendant finds no fault, and, inasmuch as we have not appealed from the judgment, that portion thereof must stand, as it is elementary law, * * * that the respondent cannot have reviewed, upon the appellant's appeal from a portion of the judgment, another portion of the judgment adverse to the respondent from which respondent does not appeal." The question presented is whether § 5630, Rev. Codes, which is the source of the jurisdiction of this court to retry cases, authorizes an appeal

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from a portion of a judgment and a retrial of a portion of a case in this court. We are of the opinion that it does not. In reaching this conclusion we are materially aided by the interpretation placed by this court upon prior statutes relating to trials de novo in this court. Chapter 82, Laws 1893, which was the original enactment, introduced into the judicial system of this state a new mode of trial in the district court and upon appeal, as to actions tried to the court without a jury, which is unlike anything theretofore existing in this jurisdiction. Under the old system cases were presented upon appeal for the purpose of reviewing and correcting errors of the trial court solely, and the powers conferred upon this court by an appeal did not extend to an independent review of the case and final determination of the same on the merits. This was changed by direct legislation as to cases tried to the court without a jury. An appeal under § 5630 plainly authorizes and requires this court to dispose of cases brought here under said section upon the merits, regardless of the action of the trial court; and this was also true under the previous statutes, which were, in this particular feature, substantially the same as § 5630, under which the appellant is seeking a retrial. Chapter 82, Laws 1893, required the supreme court to "try the case anew * * * and render final judgment according to the justice of the case." The same requirements as to retrial and final judgment were embodied in the amended act (§ 5630, Rev. Codes 1895), and in the exact language above quoted. From a brief reference to the provisions of Chapter 5, Laws 1897, now known as § 5630, Rev. Codes 1899, it will be seen that in their general nature and purpose they do not differ materially from those contained in previous statutes, and that under said section this court is required to review the case upon the merits and make a final disposition of the same. In *Tyler* v. *Shea,* 4 N. D. 377, 61 N. W. Rep. 468, 50 Am. St. Rep. 660, which was tried under Chapter 82, Laws 1893, plaintiff sought, by an appeal to this court, to secure a modification of a portion of the judgment of the trial court. This court denied the modification, upon the ground that an appeal to this court under that law opened the entire case for investigation. We quote at length from the opinion: "The terms of the act under which the appeal is taken will not permit our mere modification of the judgment appealed from. We are required by this law to try the case anew upon the same record, and to render final judgment in the action. * * * The appellant could not ask for a new trial of the case with reference to those provisions of the judgment which were against him, and at the same time insist that the balance of of the judgment favorable to him should stand without investigation. When a case is appealed for a new trial, the whole case is open for judicial inspection; and the decision upon such new trial must necessarily be founded upon an examination of the case as broad as that made by the lower court. When a party who has been defeated as to a portion of his claim in a justice's court appeals

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for a new trial in the district court, he cannot there insist that the judgment, in so far as it is favorable to him, shall stand, and only the balance of the case be litigated. The whole case is to be tried anew, and in that trial he runs the risk of losing that which the justice's judgment gave him. Where the claim is indivisible, and is all in dispute, the appeal for a new trial gives the defendant the same right to be heard on the whole case which it gives to the plaintiff, who appeals. In such a case, the ordinary rule that the respondent cannot complain of those portions of the judgment which are against him, or, indeed, of any portion of the judgment, does not apply, because the appellant, by the nature of the relief he seeks by his appealing for a new trial, opens up the entire case to a second investigation. Indeed, there is high authority for the doctrine that such an appeal, of itself, supersedes the judgment appealed from, and annuls it as effectually as though a new trial had been granted by the court in which it was rendered. These authorities hold that the appeal places the case in the same position as though it had never been tried. The judgment no longer exists for any purpose. *Bank* v. *Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Curtis* v. *Beardsley*, 15 Conn 518; *Campbell* v. *Howard*, 5 Mass 376; *Sharon* v. *Hill* (C. C.), 26 Fed. 337-345; *Earl* v. *Hart* (Mo. Sup.), 1 S. W. Rep. 238; *Burns* v. *Howard*, 9 Abb. N. C. 321; *Yeaton* v. *U. S.*, 5 Cranch, 281, 3 L. Ed. 101; *State* v. *Forner* (Kan. Sup.), 4 Pac. Rep. 357." The authorities cited by the court in the above case entirely sustain its conclusion as to the effect of the appeal. See, also, *Irvine* v. *The Hesper*, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175; *Lewis* v. *Trant*, 9 C. C. A. 54, 60 Fed. 423; *Austin* v. *Carpenter*, 2 G. Greene, 131; *Robb* v. *Dougherty*, 14 Iowa, 379; *State* v. *Orwig*, 27 Iowa, 528. Later, in *Christianson* v. *Association*, 5 N. D. 438, 67 N. W. Rep. 300, 32 L. R. A. 730, in which the 1893 law was held to be constitutional, it was said that an appeal thereunder requires "the independent judgment of this court upon the record presented, irrespective of what the trial court may or may not have held." The court, speaking through Bartholomew, J., said: "The statute under discussion requires us to render final judgment, and thus, by its mandate, forever terminate the particular litigation. This is such an innovation upon a practice that is familiar to and well settled in the professional mind that it is received with distrust. But to the legislative mind it doubtless suggested a means of terminating litigation in a manner that should at once possess the strongest probability of absolute justice with the least expenditure of time and money. It avoids the delay and expense of a second trial, and the risk of further errors that might necessitate a second appeal." Still later, in *Nichols & Shepard Co.* v. *Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089, the court, in construing § 5630, Rev. Codes 1895, after pointing out that in this class of appeals this court does not sit for the correction of errors, said, "On the contrary, we are required in such cases to try the case anew upon all the evidence offered below."

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We will now turn to § 5630, Rev. Codes 1899, under which this case was tried and the appeal taken, to ascertain whether said section also places upon this court the duty of reviewing and finally disposing of cases appealed thereunder, as was required by the statutes of 1893 and 1895. The following provisions of the section under consideration are pertinent: "A party desiring to appeal from a judgment in any such action, shall cause a statement of the case to be settled within the time and in the manner prescribed by article 8, of chapter 10, of this Code, and shall specify therein the questions of fact that he desires the supreme court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court. Only such evidence as relates to the questions of fact to be reviewed shall be embodied in the statement. But if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement. All incompetent and irrelevant evidence, properly objected to in the trial court, shall be disregarded by the supreme court, but no objection to evidence can be made for the first time in the supreme court. The supreme court shall try anew the questions of fact specified in the statement or in the entire case, if the appellant demands a retrial of the entire case, and shall finally dispose of the same whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the supreme court may, however, if it deem such course necessary to the accomplishment of justice order a new trial of the action. * * * " Does this section authorize or permit a retrial upon an appeal from a part of a judgment, i. e., a retrial of a part of a case in this court? We are of opinion that it does not. By express language the appeal therein referred to is an appeal from a judgment, and no reference whatever is made to an appeal from a portion of a judgment. We think the express language of the section plainly excludes such an appeal and retrial. This court is required to dispose of the case "whenever justice can be done without a new trial." Can this court finally dispose of a case when it has secured jurisdiction of only a portion of it? Clearly not. Again, this section, unlike the preceding statutes, provides the manner in which we shall make such final disposition. We are directed to affirm, modify, or reverse the judgment of the district court, or direct the entry of a new judgment; and when such a course is necessary to the accomplishment of justice, we may order a new trial in the action. Are the provisions just referred to reconcilable with an appeal from a part of a judgment and the review of a part of the case in this court? We think not. It goes without saying that this court could not affirm, modify, or reverse a judgment over which it had no control. Neither could it grant a new trial in an action where a portion of the judgment remains intact in the trial court. The statute under consideration plainly requires a final disposition of the entire case and an

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independent judgment thereon at the hands of this court. This command cannot be obeyed while a portion of the case remains in the trial court. A majority of this court has therefore reached the conclusion that an appeal to authorize a retrial under said section must be from the entire judgment; in other words, such an appeal as will effect a transfer of jurisdiction over the entire case to this court. It is true that under the present statute we are not compelled in every case to review all of the evidence, as under former statutes. Whether all or only a part of the evidence shall be reviewed by this court, in this class of appeals, rests with the appellant. He may choose to have all of the evidence reviewed, or he may elect, in preparing his appeal, to abide by the determination of the trial court as to a portion of the facts, and merely ask for a review of the evidence as to certain specified facts. But, whichever course is pursued, the case is presented here for final determination, and upon the merits. In one case it would be determined upon all of the evidence, and in the other upon a portion of the evidence and those facts found by the trial court which are not challenged.

It will serve no useful purpose to discuss the question whether defendant's appeal from a portion of the judgment might have been entertained had it been taken solely for the purpose of correcting errors upon the statutory judgment roll, and not for the purpose of securing a retrial under § 5630. It is sufficient to say that no such appeal has been taken or attempted. The defendant demands a retrial under said section and presents a statement of case settled for that purpose, and his appeal has no other purpose than to secure such retrial.

For the reasons stated, we are of opinion that this court is without authority, under the statute, to accord to appellant the retrial demanded. No error is assigned upon the judgment roll proper. It follows that the appeal must be dismissed, and it is so ordered. The dismissal will be without prejudice to another appeal.

MORGAN, J., Concurs.

ON REHEARING.

YOUNG, J. Counsel for appellant filed a petition for a rehearing, urging, as ground therefor, that the court erred in holding that it is without lawful authority to enter upon a retrial of a case under § 5630 upon an appeal from only a part of a judgment. The point upon which our decision was based was barely suggested by counsel for respondent, and was not argued by counsel for either party. This fact, coupled with the fact that the question had not been previously presented and passed upon by this court, and is one of much practical importance, constrained us to grant a reargument, and the same was fully reargued at the present term. Nothing has been presented which alters the conclusion reached by a majority of the court and announced in the original opinion.

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Counsel for appellant contend that our statute authorizes an appeal from a part of a judgment, and, assuming the correctness of this construction of the statute authorizing appeals to this court, they contend that it was error to deny to the appellant the retrial which he demands. This contention entirely fails to meet the jurisdictional objections upon which our conclusion was based. As stated in the opinion filed, the question whether an appeal may or may not be taken from a part of a judgment is not involved, and any expression of opinion on that question would be both superfluous and valueless. Section 5603, Rev. Codes, which creates the right of appeal to this court, and § 5606, which provides the manner of taking appeals, correspond in language with the provisions of the California and Montana statutes. In the former state it has been assumed, in a great number of cases, that an appeal from a part of a judgment is authorized. See Hayne, New Trials and App. § 15, and cases cited. A contrary conclusion was reached by the supreme court of Montana. See *Barclay* v. *Logan,* 2 Mont. 296; *Plaisted* v. *Nowlan,* 2 Mont. 359. It will be time enough to settle this question for this jurisdiction when it is directly involved.

The question which is decisive of this appeal is not whether an appeal may be taken from a part of a judgment, but is whether a retrial can be had in this court upon such an appeal. The right of appeal is one thing, and the right of retrial on the merits is another and wholly different matter. To determine whether the right of appeal exists in any case, we must look to the statute authorizing appeals, and, to ascertain whether a right of retrial in this court exists, we must look to the statute authorizing retrials; that is, to § 5630, Rev. Codes, which, as this court has repeatedly held, is the entire source of our authority to retry cases. In *Mapes* v. *Metcalf,* 10 N. D. 601, 88 N. W. Rep. 713, decided at the last term, this court, in construing § 5630, said: "The only authority possessed by this court to retry cases is conferred by § 5630, Rev. Codes 1899, and the provisions of said section operate as a limitation upon our authority to do so. That section, in unmistakable language, as repeatedly construed by this court, authorizes and requires a final disposition of cases appealed thereunder at our hands. That the express purpose of this statute is to secure a speedy and final determination by this court of actions appealed thereunder, does not admit of doubt. The original act (chapter 82, Laws 1893) required the supreme court to 'render final judgment according to the justice of the case.' The same requirement as to rendering final judgment was embodied in the amended act (§ 5630, Rev. Codes 1895). The statute now in force, while differing in some respects from the former act, nevertheless retains those features which require a review of cases appealed thereunder on their merits and a final disposition of the same by this court. Under former acts we were even without authority to order a new trial. The hardship necessarily incident to this lack of authority was relieved by the present law, which permits

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this court to order a new trial when necessary, and in furtherance of justice. It is clear that § 5630, Rev. Codes 1899, only authorizes appeals to this court for the purposes of a retrial thereunder in cases where the entire case is presented to this court for review and final determination. A retrial of a part of the issues, or of a fragment of a case, by this court would not only be contrary to the spirit of the statute, but in violation of its express language." As previously stated, all the authority which this court possesses to retry cases is found in the section referred to. This section is not embodied in the legislation of any other state. In its present form it is an anomaly in the history of jurisprudence. The undoubted purpose of the section is to secure a determination upon the merits in this court; but, by authorizing an appellant at his election to withhold from this court a retrial on the evidence of vital facts, the accomplishment of that purpose frequently becomes impsosible.

It may be that the ends of justice would be subserved by permitting appeals from a distinct part of a judgment and a retrial of the issues affecting the part appealed from, under proper restrictions. This, however, only goes to the question of what the legislature might, or perhaps ought, to have done, and does not alter the fact that in the statute under consideration it has not conferred upon this court the power to retry a part of a case upon an appeal from a part of a judgment. This is obvious from a cursory examination of the section in question. It refers to an "appeal from a judgment," and contains no reference whatever to an "appeal from a part of a judgment. The contents of the statement of case which is made necessary to secure the retrials provided for are expressly prescribed. No provision is made for a statement of case adapted to a retrial and determination of a portion of a case. This court is given authority to affirm or modify a judgment appealed from, or direct the entry of a new judgment, or we may, in furtherance of justice, "order a new trial of the action." It is patent that the jurisdiction thus conferred cannot be exercised where a portion of the judgment and a portion of the case remain in the district court, unaffected by the appeal, and it is also apparent that the provisions of the statute in question cannot be extended so as to be applicable to a retrial of a part of a case upon an appeal from a part of a judgment, except by reading into it a number of vital provisions which it significantly omits. This would be judicial legislation.

This is the first case in which this court has had occasion to consider the question presented by this appeal. In the case of *Wishek v. Hammond,* 10 N. D. 72, 84 N. W. Rep. 587, cited by appellant as a precedent, the defendant appealed from the entire judgment, and this court had jurisdiction of the entire case. Our conclusion is that the order of dismissal heretofore made should be adhered to.

MORGAN, J., concurs.

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WALLIN, C. J. (dissenting). In this action I concur in the conclusion of the majority of the court in dismissing the appeal without prejudice to another appeal, but am compelled respectfully to dissent from the views of the majority with respect to the grounds of dismissal. In my judgment the facts narrated in the majority opinion, as well as the issues actually tried and determined in the court below, called for and necessitated the entry of one indivisible judgment, which judgment, as I view the record, was actually entered by the trial court. True, the facts were such and the issues were so framed that the trial court was compelled, in deciding the case, to pronounce upon several detached features, and this was done; but under the issues the crucial question was whether the second mortgage, when delivered, operated to pay the first mortgage. The case turned below upon that question, and, in my judgment, that is the question which must determine the ultimate disposition of the case. If I am correct in this, then there was but one question involved in the case, and that was single and indivisible, and hence the judgment of the trial court, which met and disposed of that question, was in its nature a single and indivisible judgment. Its various features were interdependent and indissoluble. Therefore, in appealing to this court, there was one, and but one, judgment to appeal from. Nevertheless, the notice of appeal shows on its face that the appellant sought to appeal, not from the whole judgment, but from only one part or feature of an indivisible judgment. For obvious reasons no such appeal is legally possible. Nor, under any system of appeals, either at law or in equity, whether new or old, whether in state courts or in federal courts, would it be practicable to review an entire judgment were only a fragment of it is brought up to the reviewing tribunal. Where the appellate court sits only to review errors committed in the trial court, and to affirm, modify, or reverse the judgment entered below, it manifestly would be essential that the entire judgment, if indivisible, should be brought to the appellate court; and this reasoning applies with equal force where, as in this state, the appellate court sits in court cases to try the case anew upon the evidence and render judgment upon the merits. Upon the facts of this case, therefore, the decision of the motion to dismiss the appeal could be securely placed upon the ground that the appellant has failed to bring up for review the entire judgment of the trial court. This ground is common ground, as between members of the court, and I confess that I am unable to discover any necessity for departing from such common ground and, by a divided court, deciding the motion to dismiss upon a practice question of great delicacy and importance, which question is one which the majority declares was not, when the motion was originally presented to this court, "argued by counsel for either party." But the majority say, "The question whether an appeal may or may not be taken from a part of a judgment is not involved, and any expression of opinion on that question would be both superfluous and valueless." To the sound-

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ness of this proposition I cannot assent. I think the question is squarely involved, and is pertinent, from the view point of the majority of the court. Moreover, I think the majority has practically ruled upon the question in this case. They say, in effect, that in no case tried under § 5630 can a part of a judgment, whether the same is divisible or not, be brought to this court for trial anew upon the merits. It must, I think, be apparent that if in a court case no trial on the merits can be had in this court, where an appeal is taken from a part of any judgment, that the right to take an appeal from a part is a barren right, and of no practical value whatever, as a means of retrying the facts and issues which resulted in the entry of any judgment which is appealed from only in part. From my point of view the majority opinion goes to the extent of emasculating the plain and positive provisions of section 5606, Rev. Codes 1899, regulating appeals to this court, which reads as follows: "An appeal must be taken by serving a notice in writing signed by the appellant or his attorney on the adverse party and filing the same in the office of the clerk of the court in which the judgment or order appealed from is entered, stating the appeal from the same and whether the appeal is from the whole or a part thereof and if from a part only, specifying the part appealed from." This section prescribes the mode of taking appeals to this court, and none can be taken otherwise, and if the supreme court, under the guise of construction or interpretation, may nullify the language of the section which we have quoted, I know of no limitation which can be placed upon its authority which can prevent the annulment by construction of any or all the other language of the section. For my part I deny the existence of any such power in the supreme court, or in any court. In this matter I am convinced that the majority of the court has misapprehended the scope and object of section 5630. In my judgment that section, as originally enacted, or as amended, does not deal with the mode or manner of taking appeals to this court from judgments or orders entered in the district court. It contains no repealing words, and no rule of statutory construction is better settled than that holding that implied repeals are not favored, and are never permitted except in cases of a plain and irreconcilable repugnancy between two enactments. Nor does repugnancy ever exist where two statutes relate to different subjects. See section 138, Suth. St. Const. I maintain that the statute regulating appeals and section 5630 relate to different and dissimilar subjects. Section 5630, as its terms import, was enacted to introduce a new mode of trying court cases in the district courts and in the supreme court of this state. Under it both common-law and equity cases are triable to the court. The section was placed in an environment of legislation in which it would not fit, and for this reason, more than any other, it has proven to be a veritable Pandora's box of perplexing difficulties with which bench and bar have long wrestled, but never until the present case has the writer

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even suspected that section 5630 operates to repeal an important section of another statute,—that regulating appeals,—to which it does not refer, and with which, in my opinion, it has nothing to do. It is further my opinion that the following language of the majority of the court is employed as a result of misapprehension. The majority say, "In reaching this conclusion, we are materially aided by the interpretation placed by this court upon prior statutes relating to trials de novo in this court." I maintain that a careful perusal of the prior decisions of this court will fail to reveal any decision or holding to the effect that a judgment embracing divisible and independent parts cannot be brought to this court for the purpose of retrying one of such parts only. This question I insist is here passed upon for the first time by this court, and hence any general language used by this court in any of the cases cited should be confined to the facts and issues in the cases in which the language occurs. Finally, the rehearing opinion makes this concession in terms. The majority say, "This fact, coupled with the fact that the question had not been previously presented and passed upon by this court," etc. See opinion. In my opinion the language of section 5630, which authorizes this court to "try the case anew and render final judgment therein," when properly construed and made to harmonize with the statute regulating appeals, which statute remains intact, must be construed as meaning that a portion of a divisible judgment, which is controverted and appealed from, must be tried anew. To my mind it involves an absurdity to require suitors to relitigate a matter which the parties to the action are satisfied with and do not challenge by any appeal.

(90 N. W. Rep. 129.)

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *vs.* DICKEY COUNTY.

Taxation of Railroads—Personal Property.

The county commissioners levied, or attempted to levy, a tax upon the plaintiff's roadbed, franchise, rails, rolling stock, and other property belonging to it in Dickey county, pursuant to the action of the state board of equilization as certified to them by the state auditor under section 179, Const. *Held*, that such tax is a tax upon personal property for taxation purposes, under section 1228, Rev. Codes.

Injunction—Tax Levy.

The evidence in the case shows that the county commissioners levied, or attempted to levy, a tax for county purposes, without first making an itemized statement of the probable county expenses for the ensuing year, under section 1228, Rev. Codes, and a road and bridge tax without any petition to them for the building of any bridge or improvement of a road. *Held* no ground for restraining the collection of a personal property tax.

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Personal Property Tax Not Enjoined.

The complaint and evidence considered, and it is *held* that an injunction will not lie to restrain the collection of such personal property tax, as the plaintiff has an adequate remedy at law. Schaffner v. Young, 86 N. W. Rep. 733, 10 N. D. 245, followed.

Appeal from District Court, Dickey County; *Glaspell*, J.

Action by the Minneapolis, St. Paul & Sault Ste. Marie Railway Company against Dickey county and another. Judgment for defendants, and plaintiff appeals. Affirmed.

W. E. Purcell, L. W. Gammons & H. B. Dyke, for appellant.

The Board of County Commissioners did not prepare, record or publish an itemized statement of the county expenses as a basis for tax levy, and their failure so to do defeated the jurisdiction of the board to levy a tax. § 1228, Rev. Codes; *Shattuck* v. *Smith*, 6 N. D. Rep. 70; *Dever* v. *Cornwell*, 10 N. D. 123, 86 N. W. Rep. 227. Mandatory provisions of the statute must be specifically observed by taxing officers and a disregard or violation of said provisions is fatal to the tax and defeats the jurisdiction of the taxing officers. *Sweigle* v. *Gates*, 9 N. D. 538; *Eaton* v. *Bennett*, 10 N. D. 346, 87 N. W. Rep. 188; *Power* v. *Larrabee*, 2 N. D. 149; *Matteson* v. *Town*, 37 Wis. 254. A levy being void, it can be made valid by a curative act. Ch. 159, Laws 1901. Curative laws may heal irregularities in action but they cannot cure a want of authority to act at all. There being no jurisdiction to make a levy in the first place, same can be accomplished through retrospective legislation. Cooley on Taxation 302; Desty on Taxation 620; Welty on Assessments 231; *Pickton* v. *City of Fargo*, 10 N. D. 469, 88 N. W. Rep. 95; *Hart* v. *Henderson*, 17 Mich. 222; *People* v. *Goldtree*, 44 Cal. 323; *Maxwell* v. *Goetschins*, 40 N. J. Law, 383; *Conde* v. *Schenectady*, 51 N. Y. Supp. 854; *State* v. *Dougherty*, 60 Me. 504; *Houseman* v. *Kent*, 25 N. W. Rep. 369; *Hagner* v. *Hall*, 42 N. Y. Supp. 63; *Sessions* v. *Crunkilton*, 20 O. St. 349. It is not within the power of the legislature to make a void proceeding valid. *McDaniel* v. *Correll*, 19 Ill. 226; *Griffins Exrs.* v. *Cunningham*, 20 Gratt. 109. *Nelson* v. *Roundtree*, 23 Wis. 367; *Israel* v. *Arthur*, 1 Pac. Rep. 438; *Conway* v. *Cable*, 37 Ill. 82; *Bryor* v. *Downey*, 50 Cal. 388; *Cromwell* v. *Maclean*, 123 N. Y. 474; *Kimball* v. *Town*, 42 Wis. 412; *Richards* v. *Rote*, 68 Pa. St. 248; *Columbus* v. *Board*, 65 Ind. 427; *People* v. *City of Brooklyn*, 71 N. Y. 495; *Hamilton* v. *City*, 25 Wis. 490. The rights of suitors are to be determined by the law in force when the cause of action arose and such rights cannot, excepting as mere rules of procedure and evidence, be measured by the different legal statutes created while the action is pending, either by judicial decision or by statute. *Schaffner* v. *Young*, 10 N. D. 245, 86 N. W. Rep. 734; *Conrad* v. *Smith*, 6 N. D. 337; *Mahon* v. *Surerus*, 9 N. D. 57, 81 N. W. Rep. 64; *Norman* v. *Boaz*, 4 S. W. Rep. 316; *Thweat* v. *Bank*, 81 Ky. 1; *Turney* v. *Town*, 100

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Ky. 288. A party cannot pay a part of his taxes without paying the whole. *Wells County* v. *McHenry*, 7 N. D. 246, 74 N. W. Rep. 241; *State* v. *Cert. Lands*, 42 N. W. Rep. 476.

S. G. Cady, for respondent.

The burden of proof is on appellant to establish invalidity of tax levy. *Farrington* v. *Inv. Co.*, 1 N. D. 102; *N. P. Ry. Co.* v. *McGinnis*, 4 N. D. 494, 61 N. W. Rep. 1032. The constitution does not prohibit the passage of retrospective laws except in so far as they destroy vested rights or impair the operation of contracts. *Garrison* v. *N. Y.*, 21 Wall. 196; *Freeland* v. *Wideman*, 131 U. S. 405; *Louisiana* v. *New Orleans*, 3 Sup. Ct Rep. 285. Tax proceedings are in no manner founded upon contract. *New Orleans* v. *Tel. Co.*, 8 Am. St. Rep. 506 and note. The legislature can ratify and approve by subsequent legislation any act performed for the benefit of the state which it had original authority to legislate and provide for. *O'Hara* v. *N. Y.*, 2 L. R. A. 603; *Fuller* v. *Morrison County*, 36 Minn. 309; *Anderson* v. *Santa Anna*, 116 U. S. 356; *Iowa Land Co.* v. *Soper*, 36 Ia. 112; *Smith* v. *Callahan*, 36 Ia. 552; *Gordon* v. *San Diego*, 40 Am. St. Rep. 73. So long as a statute is within the spirit of legislative power and not an encroachment upon the provisions of another department of government it will be upheld, unless clearly in conflict with some provision of the constitution. *Wadsworth* v. *Ry. Co.*, 36 Am. St. Rep. 309; *Fox* v. *McDowell*, 46 Am. St. Rep. 98; *Burlington & Ced. Rap. Ry. Co.* v. *Dey*, 31 Am. St.Rep. 477. If the proceedings of the commissioners are void for want of jurisdiction and the thing wanting in the proceeding which they have failed to perform is something the legislature might have dispensed with a prior statute it is within the power of the legislature to dispense with it by a subsequent act. *Richmond* v. *Supervisors*, 77 Ia. 531, 14 Am. St. Rep. 308; *Iowa Savings & Loan Co.* v. *Heigdt*, 77 N. W. Rep. 1050; *Shattuck* v. *Smit*, 6 N. D. 78.

MORGAN, J. The plaintiff in this action seeks to have certain taxes, claimed to have been illegally levied against it, set aside, and the collection of such taxes perpetually restrained. The grounds on which it seeks to secure such permanent injunction are the following, as recited in the complaint: That the county commissioners failed to make a lawful levy of any taxes in said county for the year 1900, for the reason that such commissioners did not make the itemized statement of the county expenses for the ensuing year, as provided by section 1228, Rev. Codes. The proceedings of the county commissioners, so far as an attempt to levy taxes for the year 1900, as based upon an itemized statement, are the following, viz.: "On motion the following levy was made for county expenses for the ensuing year: County general fund, $20,000; sinking fund, $2,000; road and bridge, $3.500." In the published proceedings of such board of commissioners there appears no different or other

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statement, and it is stipulated that no other statement was ever made or published by such board during said year. This omission to make and publish an itemized statement, as provided by said section of the statute, is urged as a reason why such tax is void, and is urged as a ground for equitable interference by the courts to prevent its collection or enforcement. The second objection urged by the appellant to the validity of such taxes is that the board of county commissioners attempted to levy a road and bridge tax without jurisdiction to do so, inasmuch as no petition for the construction of any bridge was presented to them, and without having made an itemized statement of the proposed cost of such bridge improvement of the road. No other objections are urged against the validity of the levy or of the tax.

It is strenuously contended by the appellant that the omission to make such itemzied statement rendered any attempted levy void, and that no tax levied without a preliminary itemized statement can be a valid tax, and that the attempted levy of a road and bridge tax, without an itemized statement of the cost of such bridge or road, and without a preliminary petition to such commissioners, rendered the whole tax levied for county purposes void. It is admitted that the state tax levied by the state board of equilization is valid, and not subject to attack on any grounds. The tax involved in this suit was levied or attempted to be levied in July, 1900, and its collection was enjoined by a temporary injunction in January, 1901, and before such taxes became delinquent. The case therefore presents the question whether a court of equity will interfere with the collection of this tax, under the circumstances pleaded and stipulated, or whether the plaintiff will be left to pursue its remedies by an action at law. It is claimed by appellant that the facts pleaded and proven bring the case within the rule adopted by courts justifying the interposition of a court of equity to restrain the collection of the tax. The defendant contends that the plaintiff has not brought itself within any of the recognized principles of equity jurisprudence justifying it in passing by remedies at law and resorting to injunctional proceedings. A statement of the allegations of the complaint will show the basis of plaintiff's contention. The complaint alleges (omitting allegation of incorporation): "And as such corporation has during all of said time owned and operated, and now owns and operates, a line of railroad in said state of North Dakota, extending into and through the said county of Dickey, and as such corporation is liable for the payment of all taxes legally assessed and levied on its roadbed, franchise, rails, rolling stock, and other property belonging to said plaintiff, situated in said county of Dickey and state of North Dakota." Then follow allegations of the levy in question claimed to be void by reason of there being no itemized statement, and the omission of other requisites to making levies, claimed to be mandatory; the extension by the county auditor of the taxes so attempted to be levied against plaintiff's property; and the following allegation, given in the language of the complaint:

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"That this plaintiff is engaged in the business of operating a railway through said county, and connecting the places and people therein with eastern and western points, and is a common carrier of freight, express, and passengers into and out of said county, and all the property of plaintiff in said county is used in and about said business, and is necessary for the proper conduct thereof; that if said property, or any thereof, is seized by said officers, such seizure and distraint would seriously hamper and cripple the said business, and would inflict great and irreparable injury, and would occasion a great multiplicity of suits, and occasion great and irreparable damage and annoyance to this plaintiff and the people of said county; that plaintiff has no adequate remedy in law in said matter, and has no remedies at law for the injuries which would follow such seizure and distraint of its property as aforesaid." These allegations are statements of conclusions, and not of facts. It is not apparent therefrom, nor from the evidence that irreparable injury or damage would follow the denial of the prayer for a permanent injunction. It is not shown how a multiplicity of suits would follow such refusal of equitable relief. No claim is made that the county commissioners had no right or jurisdiction to levy this tax at that time and place, but the sole and only contention is that the tax is void for the reason of an omission by them to perform a mandatory requirement preliminary to a levy of the tax. In an early case in this state the following rule was laid down by the supreme court, and has not been departed from: "Courts of equity should, in general, extend the strong arm of their preventive power to restrain the collection of a tax or annul tax proceedings only where the property sought to be taxed is exempt from taxation, or the tax itself is not warranted by law, or the persons assuming to assess and levy the same are without authority so to do, or where the proper taxing officials have acted fraudulently; and, in addition, plaintiff must bring himself within some recognized rule of equity jurisprudence." *Farrington* v. *Investment Co.*, 1 N. D. 118, 45 N. W. Rep. 191. The case cited related to taxes upon real estate, but the principles there announced apply with more force to collection of personal property taxes than to enforcement of real estate taxes. As we construe the complaint, we do not understand that it is claimed that the tax in question is any other than a personal property tax. From plaintiff's brief and argument the same conclusion is reached; that is, that the tax in suit is deemed a personal property tax. From a consideration of the constitution and statute law of this state, we are convinced that the taxes involved in this suit are to be deemed taxes on personal property, and that the property described in the complaint is deemed personal property for taxation purposes. Section 179 of the constitution provides: "The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in this state shall be assessed by the state board of equilization at their actual value and

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such assessed valuation shall be apportioned to the counties, cities, towns, townships and districts in which such roads are located, as a basis for taxation of such property in proportion to the number of miles of railway laid in such counties, cities, towns, townships, and districts." Section 1315, Rev. Codes, provides: "The state auditor shall at the time of certifying the equalized value of each organized county to the county auditor, also certify the number of miles of each main line of railroad, and branches and side tracks thereof contained in said county and the valuation per mile of such line or branch line as determined by the state board of equilization and the county auditor of such county shall apportion such valuation to the cities, towns, townships and districts through which such railroads run according to the number of miles contained in each, as a part of the valuation of such city, town, township and district for the purpose of taxation, and the same shall be taxed as personal property." The language of this section is explicit that such railroad property shall be taxed as personal property. It is therefore personal property for purposes of taxation, although it may be in part, as a fact and for other purposes, real estate. It is within the power of the legislature to provide that such fixtures as are described in the complaint may be taxed as personal property. *State* v. *Red River Val. Elevator Co.*, 69 Minn. 131, 72 N. W. Rep. 60; *State* v. *District Court*, 31 Minn. 354, 17 N. W. Rep. 954; 1 Desty, Tax'n, 397 This property having been assessed and taxed as personal property, as commanded by the statute, it necessarily follows that its enforcement must be accomplished through the same means and channels used in collecting taxes on personal property, and that the same rules of law apply to such collection. This seems to be the theory under which the complaint was framed, as the following allegation as grounds for equitable relief will show, to-wit: "And the county treasurer threatens to proceed at once with the collection of such taxes, and the said officers threaten to, and plaintiff believes will, seize, distrain, and sell the property of this plaintiff," etc. The tax being a personal property tax, the complaint shows no facts which bring the action within any of the exceptions to the general rule that an injunction will not lie to prevent the collection of a personal property tax. The property taxed is not exempt. A constitutional law authorized its taxation, and gave the officers authority to tax it. No facts are pleaded or shown that can reasonably be said to show that there exists no remedy at law, or that irreparable damage will follow if the injunction be not granted. That an injunction will not be granted to restrain the collection of a personal property tax, except in certain cases, has recently been held by this court, and the great weight of authority favors such holding. *Schaffner* v. *Young*, 10 N. D. 245, 86 N. W. Rep. 733. The facts of the case at bar do not bring it within any of the exceptions to that rule. Neither the complaint nor the evidence shows any facts warranting a court of equity interfering with the collection of taxes

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on personal property. The plaintiff had an adequate remedy at law, and should have resorted to it, and could thereby have prevented a multiplicity of suits and any seizure of its property. *St. Anthony Elec. Co. v. Bottineau Co.*, 10 N. D. 346, 83 N. W. Rep. 212, 50 L. R. A. 262.

It follows that the judgment of the district court must be affirmed. All concur.

(90 N. W. Rep. 260.)

MARY DONOVAN *vs.* MARY A. WELCH.

Deed of Attorney in Fact—Sufficiency.

A. B., the owner of certain real estate, gave a power of attorney to P. M. to sell and convey the same, in pursuance of which a warranty deed was executed and delivered by P. M. to M. In the body of the deed so executed, the grantor and party of the first part was described as "P. M., attorney in fact for A. B." The same words were repeated in describing the grantor in the covenants, and were used in signing the instrument. They also appear in the acknowledgment. It is *held* in an action to quiet title instituted by the plaintiff, who claims under a deed subsequently executed by A. B. in person, that the deed to M., which appears upon its face to have been executed in her name and for her by her attorney in fact, althought not in approved form, is her deed, and operated to transfer the title to M., and was not the individual deed of P. M., and that her subsequent deed to the plaintiff therefor conveyed no title.

Appeal from District Court, Cavalier County; *Kneeshaw*, J.

Action by Mary Donovan against Mary A. Welsh. Judgment for defendant, and plaintiff appeals. Affirmed.

Templeton & Rex, for appellant.

The deed from McHugh to Moran conveyed no title or interest. McHugh had not title to convey, as the power of attorney authorized him to convey, not in his own, but in the name of Amelia Burritt. Subd. 3 § 3584, Rev. Codes. Conveyance must be an act of the principal and not of the attorney, otherwise the conveyance is void. The attorney must convey in the name of the principal. It is not enough for an attorney, in the body of the conveyance, to describe that he does it as attorney; it must be the act and deed of the principal, executed by the attorney in his name. *Fowler* v. *Shearer*, 7 Mass. 14; *Elwell* v. *Shaw*, 16 Mass. 42; *Echols* v. *Cheney*, 28 Cal. 157; *Stinchfield* v. *Little*, 1 Greenleaf, 231; *Caddell* v. *Allen*, 6 S. E. Rep. 399; *Norris* v. *Pains*, 39 N. E. Rep. 660; *North* v. *Henneberry*, 44 Wis. 306. *Clark* v. *Courtney*, 5 Peters, 319-350. Amelia Burritt, plaintiff's grantor, was not made a party to the fore-

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closure action nor was the plaintiff made a party. It follows that the judgment does not preclude the plaintiff from asserting her rights in this action. *Buxton* v. *Sargent*, 7 N. D. 503, 75 N. W. Rep. 811. Acceptance of purchase money by Mrs. Burritt would not constitute a ratification so as to estop her from denying that title passed by McHugh's deed. § 4315, Rev. Codes; *Salfield* v. *Sutter County*, 29 Pac. Rep. 1105. The proof in this case falls short of establishing estoppel. *Gjerstadengen* v. *Hartzell*, 7 N. D. 612, 9 N. D. 268.

Cleary & McLean, for respondent.

The deed from McHugh to Moran shows by its recital that it was the intention to make the deed that of the principal. § 4339, Rev. Codes; *Williams* v. *Livingstone*, 9 N. W. Rep. 31; *Williams* v. *Frost*, 6 N. W. Rep. 793. Amelia Burritt, plaintiff's grantor, is estopped from denying the validity of the McHugh deed by accepting its benefits. § 3866, Rev. Codes; *Morris* v. *Ewing*, 76 N. W. Rep. 1050; *Gjerstadengen* v. *Van Dusen*, 7 N. D. 618, 1 Enc. L. 1213.

YOUNG, J. Plaintiff seeks in this action to quiet title and determine adverse claims to a tract of land consisting of 160 acres, and situated in Cavalier county, of which she claims to be the owner in fee simple. The defendant, in her answer, denies that plaintiff has any title or interest whatever in the premises in controversy, and, in her own behalf, claims a mortgage lien thereon executed by one Charles McQuarrie. The case was tried to the court without a jury. The trial court found that the defendant's mortgage is a valid and subsisting lien, and that the plaintiff has no title to the land in question and entered judgment dismissing the action. Plaintiff has appealed from the judgment, and in a settled statement of case, containing all of the evidence offered in the trial court, demands a retrial of the entire case in this court, pursuant to the provisions of § 5630, Rev. Codes.

There is no conflict in the testimony as to the controlling facts. The case turns upon the legal effect of a certain warranty deed executed and delivered by "Patrick McHugh attorney in fact for Amelia Burritt," to one Frank Moran. Both parties to this action trace their alleged interest to a common grantor, Amelia Burritt, who acquired her title from the United States government. November 6, 1891, Amelia Burritt executed and delivered to P. McHugh a power of attorney to sell and convey the land in question. December 30, 1893, a warranty deed was executed and delivered by "Patrick McHugh, attorney in fact for Amelia Burritt," to Moran. July 10, 1895, Moran deeded to Charles McQuarrie, and on the same day McQuarrie executed a mortgage to the defendant to secure the payment of $700, which sum constituted the consideration for the transfer to him by Moran, and is the mortgage described by the defendant in her answer. On August 7, 1896, McQuarrie quitclaimed to Edward I. Donovan, who is plaintiff's husband. In

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1897 the defendant, Mary A. Welch, instituted an action to foreclose her mortgage, making Charles McQuarrie and Edward I. Donovan defendants. Judgment was entered in her favor. Execution was issued thereon, and the land sold on May 11, 1901; the period of redemption from said sale not having expired at this time. On November 22, 1900, Amelia Burritt, for a consideration of $25, executed and delivered a warranty deed to Mary Donovan, the plaintiff herein, the negotiations therefor being conducted by plaintiff's husband, Edward I. Donovan. All of the foregoing instruments were recorded at or about the date of their execution.

As before stated the rights of the parties to this action turn upon the construction of the deed to Moran. It is contended by the plaintiff that said deed is the individual deed of Patrick McHugh, and that it therefore did not operate as a conveyance of title, inas much as McHugh had no title to convey. If this contention is sound, it follows that McQuarrie acquired no title from Moran, and the defendant has no lien by virtue of her alleged mortgage. If, on the other hand, the deed to Moran is the deed of Amelia Burritt, and binds her, it is equally evident that her subsequent deed to plaintiff, who had both actual and constructive notice of the several transfers referred to, conveyed no title. It is properly conceded by the plaintiff that McHugh's power of attorney gave him ample authority to execute a conveyance which would bind his principal. But it is claimed that he did not do so. McHugh's authority is contained in, and limited by, the following language:

"I, Amelia Burritt, * * * do hereby make, constitute, and appoint P. McHugh * * * my true, sufficient, and lawful attorney, for me and in my name to sell and dispose of [description], * * * and to do and perform all necessary acts in the execution and prosecution of the aforesaid business in as full and ample manner as I might do if I were personally present."

The deed to Moran is in the following words and figures:

"This indenture, made this 30th day of Dec., in the year of our Lord 1893, between Patrick McHugh, atty. in fact for Amelia Burritt, of Medford, Ontario, party of the first part, and Frank Moran, party of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of two hundred ($200.00) dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns, forever, all that parcel or tract of land lying and being in the county of Cavalier and state of North Dakota, described as follows: [Description.] To have and to hold the same, together with all the hereditaments and appurtenances thereto belonging or in any wise appertaining, to the said party of the second part, his heirs and assigns, forever; and the said Patrick McHugh, atty. in fact for Amelia Burritt, party of the first part, for himself, his heirs, executors, and administrators, do covenant with

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the party of the second part, his heirs and assigns, that he is well seized in fee of the land and premises aforesaid, and has good right to sell and convey the same in the manner and form aforesaid; that they are free from all incumbrance, and the above bargained and granted land and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will warrant and defend. In witness whereof, the said party of the first part hereunto sets his hand and seal the day and year first above written. [Signed.] Patrick McHugh, Attorney in Fact for Amelia Burritt. Signed, sealed, and delivered in the presence of George Barcelo, H. D. Allert.

"State of North Dakota, County of Cavalier—ss.: On the 31st day of December, A. D. 1893, before me personally appeared Patrick McHugh, attorney in fact for Amelia Burritt, to me well known to be the identical person described in, and who executed, the foregoing instrument, and he acknowledged that he executed the same freely and voluntarily for the uses and purposes therein expressed. In witness whereof, I have hereunto set my hand and official seal at said caunty the day and year above written. W. F. Winter, Notary Public."

Is the the foregoing instrument the individual deed of Patrick McHugh, or is it the deed of Amelia Burritt? Plaintiff insists that it is the deed of McHugh, and not the deed of her grantor, Amelia Burritt; and, to sustain this contention, her counsel invoke a well-settled rule applicable to the execution of sealed instruments by agents, which rule, as applied to conveyances of real estate, is that: "If an attorney has authority to convey land, he must do it in the name of the principal. The conveyance must be the act of the principal, and not of the attorney; otherwise the conveyance is void. And it is not enough for the attorney, in the form of the conveyance, to describe that he does it as attorney; for, he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name." *Fowler* v. *Shearer*, 7 Mass. 14; Mechem, Ag. § 419, and cases cited in note; 2 Jones, Real Prop. § 1040, and cases cited; *Elwell* v. *Shaw*, 16 Mass. 42, 8 Am. Dec. 126; *Echols* v. *Chaney*, 28 Cal. 157; *Stinchfield* v. *Little*, 1 Greenl. 231, 10 Am. Dec. 65; *Caddell* v. *Allen* (N. C.) 6 S. E. Rep. 399; *Norris* v. *Dains* (Ohio) 39 N. E. Rep. 660, 49 Am. St. Rep. 716; *North* v. *Heneberry*, 44 Wis. 306; *Clarke's Lessee* v. *Courtney*, 5 Pet. 319, 350, 8 L. Ed. 140. Courts have uniformly held that: "The proper form for executing a deed by attorney is by signing the name of the principal and adding 'by ———, His Attorney,' but we know of no case holding that this is the only form of execution which will make the deed the act of the principal. On the contrary, the cases are numerous in which deeds not so executed have been held sufficient. In *Wilks* v. *Back* (K. B. 1802) 2 East, 142, 8 Eng. Ruling Cas. 634, the rule was laid down that: "One

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who executes a deed for another under a power of attorney must execute it in the name of the principal; but, if that is done, it matters not in what form of words such execution is denoted by the signature of the name. Wilks, who had a power of attorney for James Browne, for the purpose of binding himself and also Browne executed a bond in this form: 'Mathias Wilks [L. S] for James Browne, Mathias Wilks. [L. S.]'" It was urged that the signature ought to have been in the name of Browne, by Wilks, and that, inasmuch as it was signed by Wilks for Browne, it was not the bond of Browne. This contention was held to be unsound by a united court; GROSE, J., saying: "I accede to the doctrine in all cases cited that an attorney must execute his power in the name of his principal, and not in his own name; but here it was so done, for where is the difference between signing 'J. B., by M. W., His Attorney,' which must be admitted to be good, and 'M. W. for J. B.'? In either case the act of sealing and delivering is done in the name of the principal, and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done." LAWRENCE, J., in concurring, said: "There is no particular form of words required to be used, provided the act be done in the name of the principal." And LE BLANC, J., stated: "I cannot see what difference it can make as to the order in which the names stand." This case has been followed both in England and in this county with approval and without criticism. In *Mussey* v. *Scott*, 7 Cush. 215, 54 Am. Dec. 719, a written lease was thus executed: "John Hammond, for B. B. Mussey." The court held that the lease was well executed in the name of Mussey, following *Wilks* v. *Back*, supra, and in referring to that decision, stated that had never been overruled, but had always been regarded as rightly made. In *Martin* v. *Almond*, 25 Mo. 313, a deed signed as follows: "G. H. [Seal], I. J. [Seal], Attorneys for A. B. and C. D.," was held to be the deed of the principals, A. B. and C. D., following *Wilks* v. *Back*, supra. In *Magill* v. *Hinsdale*, 6 Conn. 465, 16 Am. Dec. 70, it was held that a mortgage deed which was executed by M., the authorized agent of the Middletown Manufacturing Company, and recited that "I. M. agent for the Middletown Manufacturing Company," grant, etc., and was signed, "M., Agent for the Middletown Manufacturing Company," was the deed of the company, and not his individual deed. In that case the court said: "No particular form of words is necessary for an agent to bind his principal, if he expresses in the instrument the capacity in which he acts. Deeds are to receive a construction from the whole taken together, and every deed ought to be so construed as to effect the intention of the parties. 'Ut res magis valeat quam pereat.' *Wilks* v. *Back*, 2 East 142." In *Wilburn* v. *Larkin*, 3 Blackf. 55, a bond signed as follows, "For L. J. Larkin, George Crum [L. S.]," was held to be the bond of Larkin, although its execution would have been more formal had it been signed, "L. J. Larkin, by George Crum, His At-

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torney." In *Hunter's Adm'rs* v. *Miller's Ex'rs*, 6 B. Mon. 612, a written contract signed, "William S. Hunter, for [seal] Thomas Todd and Mary Hunter," was held to be the contract of Thomas Todd and Mary Hunter. The following cases will be found in harmony with, and illustrative of, the rule of construction adopted in *Wilks* v. *Back; Jones' Devisees* v. *Carter*, 4 Hen. & M. 196; *Robbins* v. *Austin*, 42 Hun. 469; *Webb* v. *Burke*, 5 B. Mon. 51; *Shanks* v. *Lancaster*, 5 Grat. 110, 50 Am. Dec. 108; *Page* v. *Wight*, 14 Allen, 182; *Distilling Co.* v. *Brant*, 69 Ill. 658, 18 Am. Rep. 631; *McClure* v. *Herring*, 70 Mo. 18, 35 Am. Rep. 404; *Hale* v. *Woods*, 10 N. H. 470, 34 Am. Dec. 176; *Butterfield* v. *Beall*, 3 Ind. 203.

Construing the instrument under consideration in the light of the foregoing authority, and according to the highly technical rules applicable to sealed instruments, we are of opinion that it was well executed, and is the deed of Amelia Burritt. Much less strictness, however, is required in the execution of instruments not under seal. As to such instruments, it is sufficient if the intent to bind the principal appear in any part of the instrument. *Townsend* v. *Hubbard*, 4 Hill 351; *Stanton* v. *Camp*, 4 Barb. 274; Mechem, Ag. § 446, and cases cited. In this state "all distinctions between sealed and unsealed instruments are abolished" (section 3892, Rev. Codes), and "any instrument within the scope of his authority by which an agent intends to bind his principal does bind him, if such intent is plainly inferable from the instrument itself" (section 4339, Id.). The rule of interpretation as formulated by Mechem on Agency at section 436 is that "where the body of the instrument discloses that it is evidently executed for or in behalf of a principal therein named, and the person signing adds to his signature such words as indicate that he was acting in a representative, and not in a personal, capacity, the instrument will be deemed to be the obligation of the principal." The addition of the word "for" is usually held to be controlling, and as clearly indicating that the signature is on behalf of the principal named. As was said by the court in *Manufacturing Co.* v. *Fairbanks*, 98 Mass. 101: "The variation between the word 'for' and the word 'of' seems at first sight slight, but in the connection in which they are used in signatures of this kind the difference is substantial. 'Agent of' or 'president of' a corporation named simply designates a personal relation of the individual to the corporation. 'Agent for' a particular person or corporation may designate either the general relation which the party signing holds to another party, or that the particular act in question is done in behalf of, and as the very contract of, that other; and the court, if such is manifestly the intention of the parties, may construe the words in the latter sense." In *Long* v. *Colburn*, 11 Mass. 97, 6 Am. Dec. 160, a promissory note signed, "Pro W. G.—J. S. C.," was held to be the promise of W. G.; the court holding that the obvious and true construction of the instrument showed that it was a promise of G. by C., his agent or attor-

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ney. Also in *Emerson* v. *Manufacturing Co.*, 12 Mass. 237, 7 Am. Dec. 66, a promissory note signed, "For the Providence Hat Manufacturing Company—Frink Roberts," was held to be a common form of words when one person signs for another, and that they designated the character in which Roberts gave his signature. To the same effect are *Jefts* v. *York*, 4 Cush. 371, 50 Am. Dec. 791; *Ballou* v. *Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Rice* v. *Gove*, 22 Pick. 158, 33 Am. Dec. 724. As has been seen by reference to the cases hereinbefore cited, the use of the connecting word "for" has been deemed by the courts to be of such significance that instruments executed by a person "for" another, who is named, have generally been held to be well executed as the contract of the principal, even though it be a contract under seal; and, of course, it is not less so in the case of contracts not under seal. In no part of the deed here in question does the name of McHugh appear, except in connection with the name of Amelia Burritt. The party of the first part, or grantor, is named in the instrument, "Patrick McHugh, attorney in fact for Amelia Burritt." In the covenants the same description of the party of the first part is expressly repeated, and the signature to the instrument is in the same form. It is clear that the words "attorney in fact for Amelia Burritt" are not mere words of description of McHugh, but point out the representative character in which he acts, and that his act is in behalf of Amelia Burritt, his principal. Had the form "Patrick McHugh, for Amelia Burritt," been adopted, or "for Amelia Burritt by Patrick McHugh," or "for Amelia Burritt, Patrick McHugh," the execution would have been sufficient, under the authorities hereinbefore referred to. The deed in that event would undoubtedly have been the deed of Amelia Burritt. The use of the word "for" indicated that he did not act in his individual capacity, but did act in behalf of his principal, who was named, and it would seem that the addition of the words "attorney in fact" strengthened that interpretation, by pointing out specifically the particular character in which he acted for his principal. The fact that the words "he," "his," "him," and "himself" are used in the body of the deed, referring to the first party, when they should have read "she," "her," and "herself," and the further fact that the acknowledgment does not recite that McHugh acknowledged that he subscribed the name of Amelia Burritt thereto as principal, and his name as attorney in fact, as it should have been done, under section 3584, subd. 3, Rev. Codes, we do not deem of sufficient weight to overcome his plain intent, elsewhere expressed in the instrument, to make it the deed of Amelia Burritt. "Words used in the masculine gender include feminine and neuter." Section 5133, Id.

Having reached the conclusion that the deed to Moran shows upon its face that it was executed by McHugh for Amelia Burritt, and

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in her behalf, and as her agent, and that it is her deed, it follows that her subsequent deed to the plaintiff conveyed no title whatever.

Judgment affirmed. All concur.

(90 N. W. Rep. 262.)

In re Martin C. Freerks.

Attorney—Disbarment—Misleading Court—Fraudulent Judgment.

A civil action was instituted in Richland county, wherein one Mary Ann Jones was plaintiff and M. C. Freerks, the accused herein, was defendant. The relief sought by said action was the removal of a cloud upon the title of land in Richland county owned by the plaintiff, which cloud was created by a tax certificate issued on a tax sale of said land held in 1885 for taxes assessed on said land in 1882, 1883, and 1884. Said taxes were illegal, for the reason that prior and long subsequent to said tax sale the land in question belonged to the government. When said action was commenced the accused was the attorney of the said Mary Ann Jones, and, professedly acting in her behalf, drew the complaint, answer, and order for judgment in said action, and, appearing in his own behalf, drew and served the answer to the complaint. At the request of the accused, Charles E. Wolfe, Esq., an attorney at law, as an act of courtesy to the accused, gratuitously signed the complaint and admitted service of the defendant's answer, and, upon the pleadings, obtained the signature of the judge of the district court to an order for judgment in the action. The order, in effect, directed the entry of a judgment declaring said tax certificate to be void because the taxes were assessed on government land, and also directed that the same should be cancelled as a cloud upon plaintiff's title. This order was delivered to the accused by said Charles E. Wolfe with the understanding on the part of Wolfe that the accused would frame a judgment under and pursuant to the order, and cause the same to be entered by the clerk of the court. Subsequently the accused drew up and presented to the deputy clerk of the district court a form of judgment in said action, which judgment was entered by said deputy clerk at the instance and on the request of the accused, and the same was entered in the absence and without the concurrence or knowledge of said Charles E. Wolfe. The judgment, as entered, granted relief to the plaintiff as directed by the order for judgment, but said judgment, by its terms, also purported to grant other and further relief, which relief was wholly unwarranted by the order, and which could not have been lawfully granted under the facts alleged in the complaint. Said extraneous relief, as embodied in the judgment, was couched in the following terms: "And the defendant is entitled to have the amount thereof, together with interest thereon at the rate of 7 per cent. per annum from the date of the tax sale described in the complaint, refunded out of the county treasury upon an order therefor from the county auditor." Upon the presentation of this judgment to the county auditor that officer delivered to the accused, who was then the owner of the tax certificate, orders on the county treasurer for an amount aggregating the sum of $66.30. *Held*, that in procuring said judgment to be entered by the deputy clerk of the district court, embracing the language above quoted, the accused

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was guilty of deceit and artifice, whereby the court was misled and fraudulently induced to enter a judgment which the court did not desire to enter, and which it had not directed to be entered.

Fraud by Attorney.

Held, further, that a fraudulent use was made of said false and fraudulent judgment in the matter of inducing the auditor to deliver the said county orders to the accused.

Deceit by Attorney.

Held, further, that in committing said fraudulent acts the accused was guilty of deceit and unprofessional conduct, within the meaning of subdivision 3 of section 427 and of section 428 of the Revised Codes of 1899, and that under section 428 the accused was guilty of conduct for which he may lawfully be either disbarred or suspended from practice as an attorney at law.

Suspension from Practice.

Held, further, that under the extenuating facts stated at length in the opinion the court will enter an order suspending the accused from practice temporarily, but to be reinstated conditionally and upon terms as stated in detail in the order of suspension.

Disbarment Proceedings in District Court.

Held, further, that while this court has authority to discipline attorneys, and may, in so doing, either suspend them from practice or disbar them, nevertheless this court disapproves of the practice of initiating such proceedings in this court, unless in exceptional cases, or where the offenses complained of are committed in this court, or with reference to the orders of this court. As a general rule, that disbarment proceedings under the statute authorizing the same should be initiated in the district court, see sections 434—437, Rev. Codes 1899.

In the matter of the proceedings for the disbarment of Martin C. Freerks. Judgment for defendant.

Charles E. Wolfe, B. G. Tenneson, and *Edward Engerud,* for informants.

Martin C. Freerks and *George W. Freerks,* for respondent.

WALLIN, C. J. (after stating the facts). In this proceeding Charles E. Wolfe, B .G. Tenneson, and Edward Engerud, attorneys of this court, appear as informants against the accused and as attorneys in support of the accusation. Martin C. Freerks appeared in person in his own behalf, assisted by George W. Freerks, Esq., his attorney. The proceeding was initiated in this court by an accusation filed with the clerk of the court embracing the grounds of the accusation. To this accusation the defendant interposed an answer, whereupon, by consent of counsel, an order was entered appointing a referee to take the testimony herein, and report the same to the court. In pursuance of such order, all the testimony offered on both sides was taken, and filed in this court by the referee. The matter was finally submitted for determination upon a written brief filed by counsel in support of the accusation, and, after

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being orally argued by the accused in his own behalf, it was submitted to the court in behalf of the accused upon such oral argument and upon a brief filed by the attorneys for the accused.

The accusation filed in this court was signed by all of said attorneys for the prosecution, and the same was verified on information and belief by said Edward Engerud. After excluding formal parts, the accusation is as follows: "To the Honorable, the Justices of the Supreme Court of the State of North Dakota: The undersigned, Chas. E. Wolfe, B. G. Tenneson, and Edward Engerud, members of the bar of your honorable court, do respectfully show and inform your honors as follows: (1) That the undersigned were, on the 19th day of October, 1901, by an order of the district court in and for Richland county, North Dakota, appointed and directed to draft accusations against Martin C. Freerks, an attorney and counselor at law, and member of the bar of the supreme court of the state of North Dakota, and to file said accusations with the supreme court, to the end that said accusation may be investigated, and such action taken therein as, in the judgment of the said supreme court, may seem meet and proper, which original order is hereto attached, and made a part of this accusation. (2) That the said Martin C. Freers is now, and for more than two years has been, a resident of the city of Wahpeton, county of Richland, and state of North Dakota, and is now, and has been during all the time aforesaid, actually engaged in the practice of said profession. (3) That said Martin C. Freerks is now, and for more than three years last past has been, a member of the firm of Freerks & Freerks a partnership consisting of Geo. W. Freerks and said Martin C. Freerks, doing business as attorneys and counselors at law under said firm name at said city of Wahpeton, in this state. (4) That prior to the 7th day of October, 1901, said firm of Freerks & Freerks were employed and retained by one Mary Ann Jones to procure for her the cancellation and vacation of certain taxes levied during the years 1882, 1883, and 1884 by the taxing officers of said Richland county upon certain land in said county situate, and described as follows, to-wit, the east half of the northwest quarter (E. ½ of N. W. Qr.) of section thirty-two (32), in township one hundred and thirty-six (136) north, of range fifty-two (52) west, and to procure for her the cancellation of a certain tax sale of said land for such taxes had and held in the month of October, 1885, and to procure for her the cancellation of certain certificates of tax sale issued thereon at the time of such sale by the treasurer of said county to the Dakota Investment Company; such certificates being for the aggregate amount of $31.32. That said Martin C. Freerks, as such member of said firm, assumed to act and did act as attorney for the said Mary Ann Jones in said matter from the date of such retainer and employment up to and including the 7th day of October, 1901. (5) That subsequent to such retainer and employment, and

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prior to the 7th day of October, 1901, said Martin C. Freerks presented to Chas. E. Wolfe, Esq., an attorney at law of this court, a summons and complaint in the form and tenor of the copies hereto annexed marked Exhibits 'A' and 'B,' and made a part hereof, reference being had thereto for more certainty as to the contents, tenor, and effect thereof, and the same not being set forth at length for the sake of brevity. That at said time said Martin C. Freerks requested said Wolfe to sign and verify said complaint, and the same was so signed and verified accordingly. That thereupon said Martin C. Freerks at once served upon said Wolfe an answer in the form and of the tenor set forth in Exhibit C, hereto attached and made a part hereof. That at said time said Martin C. Freerks presented to the said Wolfe findings of fact, conclusions of law, and an order for entry of judgment in said action in the form and of the tenor set forth in Exhibit B, hereto attached and made a part hereof, and at said time requested said Wolfe to present the same to the Honorable W. S. Lauder, judge of the district court wherein said action was brought, and procure the signature of said judge thereto, to the end that judgment in conformity therewith might be entered thereon in said court. That the said Wolfe presented the same to said judge, procured his signature thereto, and in the presence of said judge delivered all said papers to said Martin C. Freerks, with directions to prepare a decree in conformity with the said findings, conclusions, and order. That the employment of said Wolfe in said action as attorney for the said Mary Ann Jones was merely nominal, was made by said Martin C. Freerks, and the acts done under such employment by said Wolfe were gratuitous, and for the accommodation of said Freerks." "(7) That thereafter, and on the said 7th day of October, 1901, said Martin C. Freerks made and prepared a judgment and decree in said action in the form and tenor of Exhibit E, hereto attached and made a part hereof, except that the same so made did not contain the signature of the clerk of said court or his deputy, the seal of said court, or the certificate of filing of said decree, as now shown upon said exhibit. That on said day said Martin C. Freerks presented said judgment and decree to the clerk of said court, and procured the signature of said clerk thereto, the affixing of the seal of said court thereon, and the filing in the office of said clerk all of the papers in said cause; he, said Freerks, paying the lawful fees therefor. (8) That thereafter, and on said day, said Martin C. Freerks presented said decree to one P. H. Stenerson, the county auditor of said Richland county, served a copy thereof on said auditor, and then and there demanded payment to him out of the funds of said Richland county of the sum of $66.30, representing said sum to be the amount of the tax certificates aforesaid, with interest at the rate of seven per cent. per annum from the date of the tax sale aforesaid. That at said time said Martin

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C. Freerks represented to said auditor that as a matter of law said Richland county was absolutely liable to him for the payment of said sum of money by reason of the premises, and that said decree or judgment was a judicial determination by said district court of such liability, and was a direction by said court to said auditor to issue to him, said Freerks, his (said auditor's) warrant upon the treasurer of said county for the payment thereof. That thereupon the said county auditor, believing and relying upon such representations, and being induced thereby and by said decree, issued his warrant upon the treasurer of said county, directing him to pay to said Martin C. Freerks said sum of money out of the general funds in the hands of said treasurer, and delivered said warrant to the said Martin C. Freerks. That thereupon said Freerks received said warrant, presented the same to the treasurer of said county for payment, and demanded and received from said treasurer said sum of money in lawful currency of the United States, and took and retained and still retains the same. That thereafter, and on the 8th day of October, 1901, the proper officers of said Richland county demanded and caused to be demanded of said Martin C. Freerks the repayment to said county of said sum of money, but said Freerks refused, and still refuses, to repay the same, or any part thereof. (9) That each act and all of the acts of said Martin C. Freerks as hereinbefore set forth were done by him with the intent and object on his part to procure from the said county of Richland said sum of sixty-six dollars and thirty cents, although he (said Freerks) well knew he was not lawfully entitled thereto. That all of said acts were by him done knowingly, corruptly, and willfully, and in disregard of his duties as an attorney of this honorable court, and were a gross abuse of the confidence reposed in him as an attorney. Wherefore the undersigned, as informants, pray that the conduct of said Martin C. Freerks as an attorney and counselor at law in relation to the subject-matter hereinbefore set forth may be investigated, and such action taken as may, in the judgment of this honorable court, seem meet and proper in the premises. Chas. E. Wolfe. Edward Engerud. B. G. Tenneson."

The complaint in the action of Mary Ann Jones against M. C. Freerks, which is annexed to the foregoing accusation—excluding formal parts—is as follows: "(1) That the plaintiff now is, and at all the times hereinafter specifically referred to has been, the owner of the following described real estate, to-wit, the east half of the N. W. quarter of section 32, in township 136 north, of range 52 west. (2) That the plaintiff became the owner of said premises during the month of July, 1901, by making final proof of her homestead right thereof before the United States land office at Fargo, North Dakota, and that during said month of July, 1901, she received the final receiver's receipt from said land office, and that the same was duly recorded in the office of the register of

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deeds in and for Richland county, North Dakota. (3) That during the years 1882, 1883, and 1884, while the title to said premises stood in the United States, the said premises were listed for taxation, and that a pretended assessment was made thereof, but that no taxes were ever paid thereon. (4) That during the year 1885, and in the month of October of said year, a sale of land for delinquent taxes was held in Richland county, and that at said sale a pretended sale of the premises hereinbefore described was made by the treasurer in and for said county. (5) That a pretended sale of said premises was made to the Dakota Investment Company for pretended taxes claimed to be due upon said premises for the years hereinbefore referred to, and that the said county treasurer issued to said Dakota Investment Company tax receipts and tax-sale certificates amounting together to the sum of $31.32. (6) That thereafter, and during the month of September, 1901, the said Dakota Investment Company transferred, assigned, and delivered to the defendant herein said tax receipts and certificates, and that said defendant is now the owner and holder thereof. (7) That said pretended back taxes appear on the records in the office of the county auditor in and for Richland county, and constitute a cloud upon the plaintiff's title to said real estate. Wherefore plaintiff demands judgment and decree of this court canceling said pretended taxes and the certificates and receipts, the evidence thereof of record, and decree that said taxes were and are absolutely void. Chas. E. Wolfe, Plaintiff's Attorney."

The material part of the answer to said complaint is as follows: "Answering the complaint of the plaintiff herein, the defendant admits each and every allegation, matter, and thing in said complaint contained. M. C. Freerks, Attorney pro se."

Upon said complaint and answer the district court made the following findings of fact and conclusions of law:

"Findings of fact: The above-entitled action having been brought before the court by consent of the parties thereto upon the complaint of the plaintiff and the admission of the allegations contained therein by the defendant, Chas. E. Wolfe, Esq., appearing for the plaintiff, and M. C. Freerks, Esq., appearing on his own behalf, and the court having considered the allegations contained in the plaintiff's complaint, and being duly advised in the premises: Now, therefore, it now makes and files the following findings of fact and conclusions of law: (1) That the allegations contained in the plaintiff's complaint are true.

"Conclusions of law: (1) That the taxes referred to in the said complaint were at the time of the pretended levy thereof, and now are, absolutely void. (2) That the plaintiff is entitled to a decree adjudging and decreeing said taxes, and the receipts and certificates therefor issued, to be absolutely null and void, and decreeing that the same be canceled of record, for the reason that at the time of

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the levy of said taxes, and all of them, said land was not taxable, title thereto being in the United States.

"Let judgment be entered accordingly. By the Court. W. S. Lauder, Judge."

The judgment as entered by the deputy clerk of the district court, excluding the title of the action, is as follows:

"The above entitled cause having come before the court on the 7th day of October, 1901, upon the complaint of the plaintiff and the admission of the allegations thereof of the defendant, and the court having adopted the allegation of said complaint as its findings of fact, and having specially found that the allegations of said complaint are true, and the court having made its conclusions of law from such findings of fact, and having ordered judgment to be entered herein: Now, therefore, on motion of the plaintiff's attorney, Chas. E. Wolfe, Esq., it is considered, adjudged, and decreed that the taxes referred to in said complaint, and the certificate and receipts and evidence thereof, be, and they hereby are, declared absolutely null and void, for the reason that at the time of the pretended levy thereof, and at the time of the issuance of such certificate and receipts, the premises described in the complaint were owned by the United States, and that the same were not taxable, and the said taxes, tax-sale certificate, and tax receipts, and each and all of them, are hereby ordered canceled of record; and the defendant is entitled to have the amount thereof, together with interest thereon at the rate of 7 per cent. per annum from the date of the tax sale described in the complaint, refunded out of the county treasury upon an order therefor from the county auditor. Witness the Honorable W. S. Lauder, Judge of this Court, and my hand and seal of this court, this 7th day of October, 1901. H. C. N. Myhra, Clerk of said Court, by C. A. McKean, Deputy."

In this proceeding the answer of the accused to said accusation is prolix, and many of its averments have become immaterial in the light of the evidence and the conceded facts, and therefore the same will not be set out at length. While the answer embraces a qualified general denial, it nevertheless raises no issue of fact as to the principal acts and transactions which furnished the grounds of the charge and control the case. The following facts are uncontroverted: The plaintiff in the action of Mary Ann Jones against M. C. Freerks is the owner of the real estate described in the accusation herein. Taxes were assessed against said land by the authorities of Richland county in the years 1882, 1883, and 1884, and the land was sold for such taxes in the year 1885, and a tax certificate was issued upon such sale to the purchaser, and such certificate was thereafter transferred by the purchaser to a corporation, the Security Improvement Company, and that said corporation had the tax certificate in its possession at its office in the city of Grand Forks, N. D., on or about the 17th day of September, 1901, and about said date said corporation was in the hands of a receiver;

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that the accused in said month of September purchased the tax certificate of the representatives of said corporation at Grand Forks, paying $25 therefor out of funds belonging to the firm of which the accused was a member, and the certificate was thereupon assigned and delivered to the accused, and he or his firm then and there became the owner thereof by such purchase and delivery. It is conceded that the complaint, answer, findings of fact, conclusions of law, and the judgment entered thereon in said action in which Mary Ann Jones was plaintiff and the accused herein was defendant were one and all drawn by the accused. It is further conceded that said Charles E. Wolfe gratuitously, and as an act of professional courtesy extended to the accused, signed and verified the complaint, and that, after an answer to the complaint was served by the accused on said Wolfe, that he, the said Wolfe, went before the district court, and upon the complaint and answer procured the judge's signature to the findings and order for judgment. It is also conceded that, after so obtaining the signature of the judge, said Wolfe delivered all the papers in the action, consisting of the summons, complaint, answer, and findings, to the accused herein, and did so with the understanding that the accused would personally attend to the matter of procuring the entry of judgment in the action. Said Wolfe was not present when the judgment was entered, nor was he consulted with reference to the form or contents of the judgment, but, on the contrary, the same, as entered, was framed by the accused, and was entered by the deputy clerk at the instance and upon the personal request of the accused. It is also admitted that after the findings and order for judgment were signed and delivered to the accused, but before any decree was framed or entered by the clerk (and upon the suggestion of Judge Lauder that it would be proper in such a case to notify the state's attorney of the pendency of the action and to serve that officer with a copy of the papers in the action), the accused thereupon attempted to serve the papers in said action, except the decree, upon the state's attorney for Richland county, but said attorney at that time declined to accept service of the papers. Immediately after such refusal the accused went to his office, and framed the decree, and still later in the same day caused it to be entered by the deputy clerk. The accused testified as follows: "I then went back to the office, and drew the decree as it appears in the record, and incorporated therein the provisions for the refundment of the money as near as might be in the language of the present statute, being of the opinion that that would follow as a necessary conclusion." It is further conceded that upon the presentation to the county auditor of the original papers (including the decree) in the case of Mary Ann Jones against M. C. Freerks the auditor directed his deputy to draw orders on the county treasury for the amount of the tax in question, with interest from the date of the tax sale at the rate of 7 per cent. per annum, amounting to $66.30. This was done, and on

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the following day the auditor delivered the orders to the accused, and upon their presentation by the accused the same were paid by the county treasurer out of the county funds. It appears also by uncontroverted testimony that before the accused purchased the tax certificate he sought the advice of a number of reputable attorneys upon the advisability of such purchase, and that they all, without exception, advised that it would be safe to make the purchase, for the reason that, in the opinion of such attorneys, the county of Richland would be compelled to refund the amount represented by the tax certificate to its holder, and the fact was that the government owned the land at the time the taxes were levied and when the sale was made, and for many years thereafter. It is further true that the accused testified, in effect, that he bought the certificate in the belief that the claim represented by the same was a valid claim, and legally enforceable against Richland county. This testimony, we think, is not impeached, either directly or indirectly, and hence we shall act upon the assumption, in disposing of the case, that the accused, at the time of his purchase of the tax certificate, entertained the belief that the amount represented by the same could be collected from Richland county. Now does the testimony warrant the conclusion that the accused has ever at any time changed his views on this feature of the case, or that he now entertains any other or different views as to the legality of the claim, or as to its collectibility from the county?

It further appears that within a day or two after the accused received said amount out of the county treasury its repayment was demanded of him by different representatives of Richland county, and that the accused has at all times refused, and still refuses, to return the money to the county until his right thereto has been adjudicated upon by a competent court; but the accused has at all times expressed a willingness to facilitate an early determination of the question, and has invited a suit for that purpose; but, so far as appears, no action has been instituted against the accused for the recovery of the money received on account of the tax certificate. But the evidence establishes the further fact that in the interval between the purchase of the tax certificate by the accused and the institution of said action in behalf of Mary Ann Jones the accused made certain attempts to obtain the money from the county on the tax certificate, and procure its cancellation upon the records, without resorting to judicial proceedings to accomplish such purposes. With this end in view, interviews were had by the accused with the state's attorney, and also with the county auditor. But these interviews were unavailing, and the county commissioners to whom the matter was presented by the accused did not allow the claim, but deferred action thereon. On the day the action was brought, or on the preceding day, the state's attorney, who had been looking the matter up, informed the accused "that he would have a hard time in collecting those taxes from the county board." This con-

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clusion of the state's attorney was based upon the theory that the county would not refund taxes illegally assessed prior to 1890, and he so informed the accused. The county auditor also gave the accused the same information. The auditor testified, in answer to a question asked him by the accused, as follows: "I remember you were in the office there on several occasions before that I am speaking about in reference to the taxes, and I told you that any taxes prior to 1890 the county commissioners would not entertain for a moment. Q. And didn't I call your attention to the irregularities in the 1885 sale? A. I think you did. I think there was irregularity in several instances in those back years." It clearly appears that as a result of his interviews with county officers the accused became convinced that the certificate would not be canceled upon the tax books, nor the money be paid out voluntarily by such officials, and that he must, therefore, resort to judicial proceedings to accomplish these purposes. On this point he testified as follows: "I went back to the office of the state's attorney, and told him that I would withdraw my application to the board for the refundment of that money, and have an action instituted against me in accordance with the facts, declaring the taxes void, so that Mrs. Jones could get her money; and, if any proceedings were necessary between me and the county thereafter, I would not waive my rights, so that I would still be in position to bring suit if it were necessary." Accordingly a suit was instituted, in which Mr. Wolfe, at the request of the accused, and as an act of courtesy, represented the plaintiff, Mrs. Jones, and the defendant appeared in person in his own behalf.

It is undisputed that the firm of which the accused is a member was employed by Mrs. Jones to collect a balance due her from a firm of loan agents through whom she had obtained a loan of $800, and secured the same by a mortgage upon the land in question. The loan agents refused to pay over to her the full amount due on account of such loan, and held back the sum of $214 therefrom, and refused to pay the same over until the cloud upon the title to the land caused by said taxes, tax sale, and certificate should be canceled, and vacated of record. There is no evidence that Mrs. Jones gave any specific directions to her attorneys as to the mode or manner to be pursued in removing such cloud upon the title or in obtaining the $214. So far as appears, that matter was left open, and there is no evidence that Mrs. Jones directed any suit to be brought, or any money to be invested in or about the matter of procuring the money due her from the loan agents on account of the loan. Nor does the accused make any such claim. His position is, however, that he was in good faith acting in the interests of a client when he purchased the tax certificate and invested the funds of his firm in the same. The corporation from whom the

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certificate was purchased was in the hands of a receiver at the time of the purchase. Upon this feature the accused testified as follows: "Q. What was your purpose in buying up the tax certificate? A. So as to prevent bringing a lawsuit. The company was in the hands of a receiver, and I didn't know the receiver, and I thought it was cheaper to buy those taxes, and to get them out of the way in that way, than to let this matter drag by bringing a suit, which would necessarily hang up Mrs. Jones' $214 until such action could be tried, which would not be until the latter part of the last term of court held in this county, being a court case. Q. Was your object in buying up those certificates for your own profit, or to facilitate and assist in the settlement of Mrs. Jones' matter? A. That was the only reason. Q. To facilitate settling the matter up for Mrs. Jones? A. Yes; and, having put in some money there, I tried to get it back. Q. The money you put in was Mrs. Jones' money, not firm money? A. No, it was not her money." In another place he testifies: "I went back to the office of the Security Improvement Company, and made him an offer to buy the taxes for myself, because I thought that I could handle it better than to have the taxes assigned to Mrs. Jones." Counsel have animadverted upon the act of purchasing the tax certificate, and causing the same to be transferred to the accused, and doing this without authority from Mrs. Jones, and also with a view, in part, to a personal profit to himself or his firm. With regard to this feature it is due the accused to state that nothing in this record indicates that the accused intentionally acted in any way adversely to his client's interest. In fact, as a result of the steps taken in the premises by the accused, the wishes of his client were directly promoted. Through the action taken by Mr. Freerks, the cloud was removed from the title to Mrs. Jones' land, and as a direct result of such removal the balance due her from the loan agents was obtained, and promptly remitted to her by her attorneys. Nor is there any suggestion in the record that Mrs. Jones is not entirely satisfied with all that has been accomplished in her interests by her attorneys. Nevertheless, we think that the purchase of the tax certificate without authority was hasty and injudicious action in an attorney, and this not merely because it placed the interest of attorney and client in antagonism, but especially so as the purchase of the certificate, so far as appears, was not reported to Mrs. Jones, and she was not given an opportunity to assume the ownership of the certificate, nor permitted to receive the profit which resulted from the financial venture. It was, we think, the duty of the accused to call the attention of his client to the fact that there was an opportunity of buying the certificate at a discount, and then permit her to decide whether she would take the venture or refuse to do so. The information came to the accused directly in the course of his professional employment, and in such cases an attorney cannot legitimately withhold any information from his client

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which may be of value to him. Much less should the attorney suppress the information, and seek a personal advantage from the same, as appears was done in this case. It has been said that "an attorney cannot accept interests conflicting with those of his client. Any deviation in this respect may expose him not only to an action for damages on the part of his client, but to discipline on the part of the court." See Weeks, Attys. at Law, § 271. In section 268, Id., the following language is employed by the same author: "Attorney and client sustain to each other the relation of trustee and cestui que trust, and their dealings with each other are subject to the same intendments and imputations as obtain between other trustees and their beneficiaries." We therefore, upon the facts in this record, cannot permit this feature of the conduct of the accused to pass without notice, nor without the censure of this court.

We turn now to the specific charge against the accused, and that upon which the conclusion reached by the court in this proceeding must finally rest. The accusation, roughly stated, consists of a charge of fraudulently procuring the entry of a judgment in the district court in the case of Mary Ann Jones against M. C. Freerks, which judgment, it is claimed, was, as to its fraudulent features, wholly unwarranted by any adjudication made by the court in that action, and for the entry of which no order was ever made or signed by the judge of said district court. It is further charged that said fraudulent feature of the judgment was framed and caused to be entered in the judgment book by the accused for the sole and only purpose of promoting his own pecuniary interests, and that the interests of his client, Mary Ann Jones, were not advanced or promoted in the least by the entry of so much of said judgment as is fraudulent. The order signed by the judge of the district court, so far as the same is now material, was in the following language: "The allegations contained in the plaintiff's complaint are true. Conclusions of law: (1) That the taxes referred to in said complaint were at the time of the pretended levy thereof, and now are, absolutely void. (2) That the plaintiff is entitled to a decree adjudging and decreeing said taxes and the receipts and a certificate therefor issued to be absolutely null and void, and decreeing that the same be canceled of record, for the reason that at the time of the levy of said taxes and all of them said land was not taxable, title thereto being in the United States. Let judgment be entered accordingly." It is true that the relief authorized by this order was, and quite properly, embodied in the decree as framed by the accused and entered in the judgment book. But the decree went further, and introduced another highly important feature, which is not found in the order for judgment. The added feature of the judgment is couched in the following words: "And the defendant is entitled to have the amount thereof, together with interest thereon at the rate of 7 per cent. per annum from the date of the tax sale described in the complaint, refunded out of the county treasury.

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upon an order therefor from the county auditor." It is conceded that the auditor, to whom the judgment was exhibited, acted upon this last-mentioned feature of the judgment in issuing and delivering the orders upon which the accused obtained the money out of the county treasury, and the evidence clearly shows that the auditor would not, in the absence of a mandatory judicial decree, have issued any order upon the treasury for the refundment of these taxes, or any other taxes assessed prior to the enactment of the revenue law of 1890. In fact, the law under which the accused now claims that he was entitled to a refundment does not authorize a county auditor to draw any order of refundment on the treasury. See Comp. Laws, § 1629. This section provides that the "county is to save the purchaser harmless," and ultimately holds the treasurer and his bondsmen responsible; but nowhere in the statute is there a suggestion that the auditor, of his own motion, can intervene, and issue a refundment order as a means of saving the purchaser harmless. In the absence of an express authorization to do so, the indemnity provided for in said section 1629 could lawfully be obtained only by the action of the county commissioners, and in this case it clearly appears that the commissioners were unwilling to act, and the accused had been repeatedly advised by county officials that the taxes would not be paid voluntarily by the action of the county board or on the initiative of any county official. Therefore the inference cannot be avoided that the accused, in framing this obnoxious feature of the judgment and in exhibiting it to the auditor, did so advisedly, and with the specific purpose of fraudulently using the same as a means of drawing out of the treasury the sum of $66.30, which sum, whether legally due him or not,—a point not decided in this case,—he well knew would not have been paid to him voluntarily by said officer, or any of the county officers, or paid at all, except in obedience to a judicial mandate requiring in plain terms such payment to be made. In fact, the district court itself would have been without authority, upon the facts stated in the complaint, to direct the county auditor to issue the orders which were issued by him; and it could not have lawfully done so even in a case where the right of the defendant to a refundment under section 1629, Comp. Laws, had been regularly adjudicated by the court. The right of an auditor to draw an order upon the treasury without previous action by the commissioners is exceptional, and never exists except as a result of legislation giving the authority in express terms. In this case, where the claim arises under section 1629, no such legislation exists, and the accused well knew that fact; at least he well knew that it would be practically impossible to obtain the money out of the treasury without first obtaining a judgment in terms requiring the refundment to be made.

Under such a state of facts this judgment was fabricated, and caused to be entered. It served the purposes of the accused only

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too well. In obedience to its apparent, but utterly false and spurious mandate, the auditor, being deceived and imposed upon, issued the orders, and delivered them to the accused, as the fruits of a gross deception, practiced alike upon the court and its officers and upon the auditor. By this false instrument, purporting on its face to be the solemn judgment of a court of record, the accused in this proceeding was enabled to realize at once upon a claim against the county which had never been litigated or adjudicated upon by the court, or presented for adjudication. It is quite true, and we shall take account of the fact, that the accused believed, and had plausible grounds for believing, that he had a claim against Richland county capable of legal enforcement. But this fact can have weight only in mitigation of his offense. It does not alter the lamentable fact that the accused fabricated a judicial decree, and caused it to be entered,—a decree not warranted by the order for judgment, and one which imposed upon the clerk of the court, and which was, in its essential aspect, a deception practiced upon the court,—and this with the sinister purpose of drawing money out of the county treasury in a mode and manner not authorized by any law, and in violation of the established procedure regulating the framing and entry of judgments in the district court. This conduct, in our judgment, not only clearly violates the ethics of the profession, but it also evinces a degree of moral turpitude in the accused which this court can neither overlook nor condone. Before an attorney can be admitted to practice at the bar in this state, he is required to take the oath prescribed by section 211 of the state constitution, and in doing so he swears that he "will faithfully discharge the duties of the office of" an attorney at law. In this case there can be no question that this oath has been disregarded by the accused. Again, we find that the duties of an attorney under the statute must be measured by a high standard of moral rectitude. Under subdivision 3 of section 427, Rev. Codes 1899, an attorney is bound "to employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of fact or law." The punishment denounced upon attorneys and counselors for deceit or collusion is specified in section 428, Id., which reads: "An attorney and counselor who is guilty of deceit or collusion or consents thereto, with intent to deceive a court, judge or party to an action or proceeding is liable to be disbarred and shall forfeit to the injured party treble damages to be recovered in a civil action." As has been seen, the deceit in this case was practiced upon the district court in procuring the entry of a judgment which was fraudulent, and the same act was a deceit practiced upon the judge of the court in entering a judgment never authorized by the judge. Moreover, the judgment as entered represents a gross deceit practiced upon a brother attorney, who, at the solicitation of the accused, had consented to act as

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attorney for the plaintiff in the action in procuring the order for judgment. Mr. Wolfe thereby assumed an official relation in the case as attorney for plaintiff, and became responsible to the district court for the conduct of the case in accordance with law and the rules governing practice and procedure in district courts. Nevertheless, a judgment was entered in the action which was fraudulent, and this result was brought about by the direct act of the accused, who intervened after a proper order had been procured by Mr. Wolfe, and delivered to the accused, as the basis for the entry of a proper judgment. While Mr. Wolfe is entirely free from any wrongdoing in this matter, he is none the less, on the face of the record, the attorney of the plaintiff, and is, upon the face of the papers made responsible for the entry of the judgment, and for all its parts and features. It is perfectly clear that the mischief precipitated by the entry of the judgment is directly traceable to the purchase of the subject-matter of the litigation by the accused when acting as attorney for the plaintiff. Such an act, when done without authority, is highly reprehensible in an attorney. See 3 Am. & Eng. Enc. Law (2d Ed.) p. 335. The judgment is double in character, and attempts to afford double relief. It attempts to further interests which were essentially antagonistic in contemplation of law. The accused, as owner of the tax certificate, legally occupied the same antagonistic relation to the plaintiff which, before such purchase, was occupied by the owner and assignor of the certificate. No attempt was made by the accused to defraud his client, but, on the other hand, his purchase of the certificate led directly to the perpetration of the fraud. After becoming owner of the certificate, the next step was to cause an action to be instituted, in which the accused was in fact the real representative of both parties to the suit; and this position, always equivocal and dangerous when occupied by an attorney, was assumed in this case to serve interests other and in addition to those of Mary Ann Jones; i. e., the personal interests of the accused. It is but just to the accused to add that when the case of Mary Ann Jones was presented to the district court for determination both Mr. Wolfe and the judge of the district court knew and understood the fact to be that Mr. Freerks intended to use the judgment as a means of bolstering a claim against the county of Richland for the refundment of the taxes in question. It was in fact for this reason that the judge directed Mr. Freerks to serve a copy of the papers then before the court in the action upon the state's attorney. But this fact does not excuse or tend to excuse the act of deceit involved in preparing a judgment which was not authorized by the order of the court, and one which could not have been lawfully rendered upon the facts alleged, or upon any other facts which could have been truthfully alleged, in the complaint. No facts would have authorized a judgment directing the auditor to draw the orders.

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One word further must be added upon a feature of the oral argument made by the accused in this court, and also vehemently urged by his attorney in his brief filed in this court. The accused and his attorney have used extreme language in their attempts to cast reflections both upon Mr. Wolfe and Judge Lauder on account of the interest manifested by them in procuring the institution and prosecution of this proceeding in this court. The motives of Mr. Wolfe and Judge Lauder are characterized as sinister and malevolent, and they are directly charged with malicious and revengeful motives in pressing this matter to a hearing in this court. We desire to say that this charge is not sustained by the evidence in any degree whatever. The nature of the acts committed, and the direct consequence which resulted from the same, could not be overlooked either by the presiding judge or by the attorney who was also a victim of the fraud. Judge Lauder would have been fully justified in so doing if he had personally directed a member of the bar of his court to file an accusation in the district court against Mr. Freerks, and we think it was an act of delicacy on his part in directing the informants to file the accusation in another court than that over which he presided. Under such circumstances this court can have no sympathy with the unprofessional attempt made in behalf of the accused to besmirch the presiding judge of the district court. Nevertheless, as a matter of practice, we are clear that the informants, in filing the accusation in this court, acquired no additional right or authority to do so from the order directing it, which was made by the lower court. The accusation here, therefore, stands upon the individual action and initiative of the attorneys who filed the same in this court. In filing the accusation the attorneys have acted in accordance with their professional duty. But we desire to say, in the interests of a sound practice, that accusations of this kind appear in this court with unwelcome frequency. While this court has undoubted jurisdiction to discipline members of the bar, the fact remains that it should not, unless in exceptional cases, be called upon to sit as a nisi prius court in this class of cases. The policy of the statute clearly authorizes a different practice. See especially section 437, Rev. Codes 1899. That section, to be fully effectual, may require amendment, but while it stands we can entertain no doubt that it is the duty of district courts to shoulder their share of the responsibility of passing upon this class of cases. The grounds of the charges in this case occurred in the district court, and came to the knowledge of that court; and hence, under section 434, Id., that court had a right to require the accusation to be filed in that court, and such a course, in our opinion, would be much better practice than that pursued.

It remains only to announce the conclusions of the court. There are some circumstances of mitigation in this case, chief among which we place the fact that the accused in all that he did apparently acted in the honest belief that he was legally entitled to receive the

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amount which he actually obtained from the county treasury. In other words, we credit Mr. Freerks with entertaining the honest belief (whether well grounded or not we do not attempt to decide) that the tax certificate which he owned represented a claim against the county which was legally enforceable. We consider this fact in mitigation, and therefore shall not inflict the full punishment of disbarment, which might legally be imposed in this case under the evidence. We have concluded to direct the suspension of Martin C. Freerks from the practice of law in all courts of this state for an indefinite period of time, which period, however, is limited as follows: The accused or his attorney will be permitted on the first day of the second regular term of this court which convenes in the year 1903 to move in this court for the vacation of the order directing his suspension from practice as an attorney at law. Upon the presentation of such motion this court will direct the vacation of such order upon terms and conditions following: If it shall, when said motion is made, satisfactorily appear that within 30 days after the date of the order of suspension Mr. Freerks paid into the hands of the treasurer of Richland county said sum of $66.30, which we hold was fraudulently obtained by him, and if at that time no verified complaint has been filed in this court charging the accused with violating the terms of the order of suspension, we shall, upon such showing, vacate such order. The clerk of this court is directed to enter an order in substantial conformity to this opinion.

All the judges concur.

(90 N. W. Rep. 265.)

STATE *ex rel* A. W. CLYDE *vs.* W. S. LAUDER.

Prosecuting Attorneys—Refusal to Act—Compensation of Substitute—Deduction from Prosecutor's Salary—Propriety—Review by Certiorari.

W. Q., who was the defendant in a certain criminal action instituted in McIntosh county, after a preliminary examination, was held to answer in the district court for a public offense. The state's attorney of said county, not desiring to prosecute the defendant further, filed his reasons therefor with the clerk of the district court, pursuant to the provisions of section 7084, Rev. Codes 1899. The district court overruled said reasons, and by an order entered in the minutes declared that it did not deem the state's attorney a proper person to prosecute the criminal action in question, and by a subsequent order entered in the minutes appointed one L., an attorney at law, to act as prosecutor in said criminal action. By a still later order, reduced to writing and filed with the clerk of the district court after court had adjourned for the term the presiding judge directed the auditor of said county to deduct from the salary of the state's attorney the sum of $100, which amount

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was the sum fixed by said order as the compensation of L. for prosecuting the action. In said last-mentioned order the grounds for deposing the state's attorney and for appointing L. to prosecute are stated as follows: "And said attorney in open court stated that in his opinion the said defendant should not be prosecuted, and refused to proceed with the prosecution of said cause," etc. *Held*, conceding, for the purposes of this proceeding only, that the above-quoted grounds of the order made by the trial court, requiring the county auditor to deduct $100 from the salary of the state's attorney, are true, and conceding that the state's attorney willfully refused to file an information and prosecute said criminal action, that such order was made without authority of law, and the same is null and void. There was a state's attorney for McIntosh county, and he was not absent from court, nor was he "unable" by reason of bodily or mental disability, to "perform the duties of his office." Therefore none of the statutory conditions authorizing an order making deductions from the salary of the state's attorney existed in this case. See section 1986, Rev. Codes. *Held*, further, that a refusal to prosecute, or willful misconduct in office, will not justify any such order in a case where the state's attorney is present in court and able to perform his official duty. *Held*, further, that the order depleting the salary of the state's attorney is not an appealable order, and that for the injury necessarily resulting from such an order the law in regular course does not afford a remedy which is plain, speedy and adequate. Hence the writ of certiorari is the proper remedy to bring up such order for review.

Certiorari by the state of North Dakota, on the relation of A. W. Clyde against Hon. W. S. Lauder, judge of the Fourth judicial district, and Paul Kretschmar, clerk of the district court for McIntosh county, to review an order of the court deducting from relator's salary as state's attorney the compensation to another attorney appointed to prosecute a criminal action. Reversed.

Morrill & Engerud, for plaintiff.

The district judge has power to appoint pro tempore a state's attorney when the state's attorney is unable to perform his duties or is absent, and when there is no state's attorney in the county. Section 1896, Revised Codes. The state's attorney was present and actually performing his duties. The statute imposes upon him the duty of examining the facts and determining whether the defendant should be informed against. His duties are quasi judicial in this respect. If the state's attorney in bad faith refuses to act there is ample remedy by contempt and proceedings for removal from office and the court can call a grand jury or the people of the county can petition for a grand jury. Sections 7986 and 1985, Rev. Codes. Neither the letter nor the spirit of the law sanctions the construction of the word "inability" as equivalent to the word "refusal." Certiorari is the proper remedy in this case. *State* v. *Ross*, 4 N. D. 319. 331-333.

M. A. Hildreth and *Nels Larson*, for defendant.

The duties of the state's attorney as a public prosecutor are de-

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fined by the Code, § 1979, Rev. Codes. When the state's attorney is absent or unable to attend to his duties and when necessary the court may appoint by an order to be entered in the minutes of the court, a suitable person as attorney to perform for the time being the duties required by law of the state's attorney. Section 1986, Rev. Codes. Relator refuses to prosecute one William Quatier assigning as his reason therefor that the facts did not show defendant guilty of a public offense but that he believed defendant to be the victim of a high-handed outrage which deserved stern rebuke. Upon this showing relator was disqualified and unable to attend to his duties within the meaning of § 1986, Rev. Codes. *Korth* v. *State*, 65 N. W. Rep. 792.

WALLIN, C. J. In this proceeding a writ of certiorari issued out of this court upon the petition of the relator, A. W. Clyde, who at all times in question was the duly elected and qualified state's attorney of the county of McIntosh, in this state. The petition for the writ is as follows:

"A. W. Clyde, being first duly sworn, states on oath that he is, and for more than one year last past has been, the duly elected, qualified, and acting state's attorney, in and for McIntosh county, state of North Dakota. That Hon. W. S. Lauder is, and for more than one year last past, has been, the duly elected, qualified, and acting judge of the Fourth judicial district of the state of North Dakota. That Paul Kretschmar, during said time, has been, and is now, the duly elected clerk of the district court of McIntosh county, North Dakota. That, previous to the convening of the last regular term of the district court in and for McIntosh county, a criminal prosecution was commenced in justice's court, before John J. Doyle, a justice of the peace of McIntosh county, on the complaint of one Ed. Lunn, against one William Quatier, as defendant, charging said Quatier with the crime of resisting an officer while in the discharge of his official duties. That said prosecution was instituted without the approval or consent of this affiant, and such proceedings were had in said action before said justice that said William Quatier was bound over to appear before the district court, at the next regular term, to be held in Ashley, McIntosh county, on the 14th day of May, 1901, to answer to said charge. That on the first day of the regular May term, 1901, of said district court at Ashley, McIntosh county, North Dakota, to-wit, May 14, 1901, this affiant, as state's attorney of said county, appeared before said court, and filed therein a statement, in writing, of his reasons for not filing an information against said William Quatier, and moved the court for leave to dismiss said prosecution. That a copy of said statement is hereto annexed, marked "Exhibit A," and made a part hereof, and the statements therein are all true, to the best of affiant's knowledge, information, and belief. That afterwards, on the same day, said W. S. Lauder, as judge of said court, denied affiant's

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motion to dismiss said prosecution, and directed that information be filed against said Quatier, and thereupon said affiant, in open court, stated and announced that he would file such information as soon as he could prepare the same, but would ask the complaining witness to verify the same, to which statement of the affiant he, the said W. S. Lauder, as judge of said court, replied, by an oral statement, which he then and there made, in words following, to-wit: 'It will not be necessary, Mr. Clyde, for I do not consider you a proper person to have charge of this prosecution, and have decided to appoint another attorney to file the information and have charge of the prosecution,' or in other words in the same import; that later in said term, to-wit, on May 16, 1901, said W. S. Lauder, as presiding judge, in open court, orally appointed one Nels Larsen, Esq. of La Moure county, North Dakota, to file information and conduct the prosecution against said Quatier, but did not fix the amount of compensation for said services, or make any order or announcement as to the payment thereof, or the retention of the same, or any part thereof, out of the salary of affiant as state's attorney, and did not make or file, or cause to be entered in the minutes of the court, any formal order appointing said Larsen until the evening of May 17, 1901, after the final adjournment of said court for said term, as affiant is informed and believes; when he made and filed with said clerk, and caused to be entered on the minutes of said court, an order, a true copy of which is hereto attached, marked 'Exhibit B,' and is made part hereof for reference. That the recital in said order to the effect that affiant had refused to prosecute said criminal action against William Quatier is not true, but, on the contrary, the facts are as hereinbefore stated in this affidavit. That, pursuant to the directions and order of said Judge Lauder, said order (Exhibit B) was served upon the board of county commissioners and auditor of said McIntosh county; and in obedience thereto said auditor refuses to pay affiant his lawful salary in full, but withholds from him the sums payable to said Larsen by the terms of said order. That said order of the said district court was and is illegal and void, and in excess of the jurisdiction vested in said court, or the judge thereof, in this: that it falsely recites that affiant refused to prosecute said criminal action; and further directs that part of affiant's salary shall be withheld from him and paid to said Nels Larsen, although this affiant was then and there the duly elected, qualified, and acting state's attorney of McIntosh county, and was then and there, at all times, present, able, qualified, and willing to act in said matter; and in recommending the dismissal of said prosecution was acting in the due and lawful performance of his duties as such state's attorney. Affiant therefore prays that the honorable, the supreme court of the state of North Dakota, cause a writ of certiorari to be issued out of said court to the judge and clerk of the district court in and for McIntosh county, requiring that all the records, papers, and facts in reference to the

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matter herein complained of may be certified to the supreme court, to the end that it may be informed in relation to said matter, and may vacate, annul, and set aside said unlawful proceeding, or grant such other relief therefrom as justice and law may require."

The mandate embodied in the writ, so far as the same is material, is as follows:

"Now, therefore, these presents are to command you, the said defendants, to certify and transmit to the supreme court of the state of North Dakota all records and proceedings had in the district court in and for McIntosh county, Fourth judicial district of the state of North Dakota, in relation to that certain order made on the 17th day of May, 1901, and filed in the office of the clerk of the district court of McIntosh county on said day, entitled in a criminal action against William Quatier, by which order one Nels Larsen was appointed in the place of A. W. Clyde to prosecute said action, and whereby said Nels Larsen was allowed a fee of one hundred dollars, to be deducted from the salary of A. W. Clyde, as state's attorney of said McIntosh county, and you are further required to state and fully inform this court in relation to the following matters alleged in said affidavit of A. W. Clyde: (1) Whether said order complained of in said affidavit of A. W. Clyde was made before or after the final adjournment of the regular May, 1901, term of the district court of McIntosh county? (2) Whether or not said A. W. Clyde, as state's attorney, was unable to attend to his duties and to prosecute said criminal action against William Quatier mentioned in said affidavit, and also showing the facts and circumstances relative thereto? And you will file your return to this writ with the clerk of this court at Bismarck on or before the 6th day of January, A. D. 1902, to the end that this court may review said proceedings and make such orders in relation thereto as law and justice may require, and the hearing on said return will be had at Fargo, N. D., at the opening of the Fargo session of the March, 1902, term of this court, or as soon thereafter as counsel can be heard."

The writ was served upon the defendants, and in obedience thereto the defendants certified to this court all the records, orders and papers referred to in the writ, including the files in the criminal action wherein the state of North Dakota is plaintiff and William Quatier is defendant; and defendants also filed in this court, in response to the requirements of paragraphs numbered 1 and 2 of said writ, certain affidavits, viz., the affidavit of the Honorable W. S. Lauder, who made the order complained of by the relator; also the affidavits of one A. P. Guy and one E. H. Lunn. The relator has also filed certain counter affidavits in this court, viz., affidavits made, respectively, by Johann Meidinger, W. A. Linn, Gottfrey Bietz, and A. W. Clyde. The return shows that the papers filed with the justice of the peace in the criminal action in which said William Quatier was defendant were on file with the clerk of the district court for

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McIntosh county when that court convened at a regular term thereof, held for said county on the 14th day of May, 1901.

It appears that as soon as court opened on the first day of said term the relator herein in open court suggested to the court that said criminal action against Quatier ought not to be further prosecuted, and that the same should be dismissed, and in connection with such suggestions the relator filed with the clerk of that court a writing setting forth the reasons upon which said suggestions were founded, which reasons were read to the court, and are as follows:

"Upon the examination of the return of the justice herein, and after full inquiry into the facts and circumstances on which the prosecution is based, I am of the opinion that an information ought not to be filed herein for any offense whatever. Following are my principal reasons for such determination: (1) The pretended complaint does not purport to show that the prosecution was commenced or carried on before the justice by authority of the state of North Dakota or of its laws. (2) Said complaint does not appear to have been submitted to the state's attorney for his approval as to the issuance of a warrant thereon, or approved by him to the same, or purport to show why it was not so submitted; and no sufficient cause why the same was not so submitted appears from other competent evidence. (3) Said pretended complaint does not state facts charging any public offense, either in words of the statute, or equivalent words, unless, possibly, the offense of assault and battery. (4) An offense covered by the allegations of said pretended complaint, or growing out of the said transaction therein alleged, or necessarily connected therewith, and of which the defendant is sufficiently appraised by said allegation, cannot be charged herein, of which the defendant can or ought to be convicted, for the reason that the evidence would, in my judgment, justify the finding that the officer was a trespasser upon the premises of the defendant attempting to levy an execution upon exempt property of the defendant or of his wife, and enforcing his attempt by the unlawful use of a revolver, which he carried concealed, and with which he seriously wounded defendant's wife in the prosecution of such unlawful attempt, all done in the presence of and with the implied sanction of the attorney for the execution plaintiff; and that defendant used no more force in opposing such attempt than was necessary to protect his constitutional rights in the premises. (5) The return of the justice shows that the preliminary examination was conducted in shameless disregard of defendant's lawful and constitutional rights in the premises, in not informing him of his right to counsel, in compelling him to enter a plea, and to give testimony against himself. (6) Believing that the facts do not show the defendant guilty of a public offense, but, on the contrary, that he is a victim of a high-handed outrage, which deserves stern rebuke, I cannot verify an information in the form prescribed by law. (7) While I was prostrated by sickness, and before I went away for

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treatment, I was visited by the officer in question, accompanied by the attorney for the execution plaintiff, and requested to deputize said attorney to prosecute said defendant in the premises, which I refused to do, for the reason that upon his own admission he had previously had difficulty with said defendant over the claim they were so trying to collect, in which both parties became angry and threatening, and for the further reason that I had some reason to believe said attorney was otherwise interested in said claim, and therefore I did not deem him a suitable person for that purpose; and I then and there refused to sanction such prosecution, or the issuance of a warrant, until I could make further investigation, stating to said officer that, as we both well knew, there was not the least reason to apprehend that said defendant would attempt to escape from the county. A. W. Clyde, State's Attorney. Ashley, May 14, 1901."

This document was presented to the district court at its morning session, and, so far as the minutes of the proceedings of the court, as kept by the clerk, show, no further action was had in the matter until after the noon recess of the court. When the court reassembled the following order was made and entered in the minutes by the clerk: "At 2 o'clock p. m. same day. *The State of North Dakota* vs. *William Quatier.* Now, on court convening at 2 o'clock p. m., comes now A. P. Guy, Esq., and files affidavit in opposition to discontinuing the prosecution. Thereupon it is ordered that the reasons of A. W. Clyde, state's attorney, be overruled, and that information be filed. And that it is the court's opinion that A. W. Clyde is not a proper person to prosecute this action." The next entry made in Quatier's case in the minutes of the district court is as follows: "Third day, May 16, 1901. *The State of North Dakota* vs. *William Quatier.* Now, on the opening of court on this day, it is ordered that Nels Larsen, Esq., is duly appointed acting state's attorney by the court to file an information and to prosecute this action until final determination thereof. Formal order will be drawn by the court and filed, and fixing compensation." The clerk's minutes show that further proceedings were had in the criminal action, but such proceedings are not material, and will not be further mentioned, except to say that said A. W. Clyde took no part therein, and the state was represented by said Nels Larsen as state's attorney pro tem. The minutes of the district court further show that said term of court adjourned on May 17, 1901, and the following entries appear in the minutes of the court as of said date: "Court adjourns until 8 o'clock p. m. of same day, with the announcement that the business of the term is ended, except that the court has some orders to file. Afterwards on the same day, between the hours of 7 and 8 o'clock p. m., Hon. W. S. Lauder, judge of the court, returns to the court room, procures the papers in the said action, and dismissed the clerk, with the explanation that he wanted the papers at the hotel. And at 8:30 o'clock p. m. same day, on the street in Ashley, said judge delivered papers to the clerk, with an

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order appointing Nels Larsen, Esq., as attorney to file information and to have charge of the prosecution of said action, and fixing his compensation, which order he directed to be filed and served. Order filed and served accordingly." The written order handed to the clerk of the district court by Judge Lauder is as follows:

"It appearing to the court that on the 27th day of December, 1900, an information, duly verified, was filed in the office of John J. Doyle, justice of the peace within and for McIntosh county, North Dakota, in which said information it was charged that the said defendant, William Quatier, did, on the 11th day of December, 1900, commit the offense of resisting an officer in the discharge of his official duties, with force and violence, and by means of a dangerous weapon; and it further appearing that on the 27th day of December, 1900, after an examination held, the said defendant was, by the said John J. Doyle, duly held to answer to the district court in and for McIntosh county for said offense, and that the said William Quatier did give bonds for his appearance at the next term of said court in the sum of five hundred dollars; and it further appearing that on the 14th day of May, 1901, upon the opening of the regular term of the district court in and for McIntosh county, A. W. Clyde, state's attorney in and for said county, filed in the clerk of court's office his reasons for refusing to file an information against said William Quatier and prosecute said cause, and said state's attorney in open court stated that in his opinion the said defendant should not be prosecuted, and refused to proceed with the prosecution of said cause: The court, being of opinion that an information should be filed against said defendant, and the said cause prosecuted, it is hereby ordered, that Nels Larsen, Esq., attorney and counselor at law of this state, and a resident of this state, be, and he hereby is, appointed acting state's attorney in and for said county of McIntosh, for the purpose of filing an information against said defendant in said action and prosecuting said action until the final determination thereof. It is hereby further ordered that the fee of the said Nels Larsen, Esq., be, and the same hereby is, fixed at the sum of one hundred dollars, payable as follows: Fifty dollars at once, and fifty dollars when said cause shall have been finally disposed of, and the county commissioners of McIntosh county, and the auditor of said county, are hereby directed to retain from the salary of said state's attorney of McIntosh county the said sum of one hundred dollars. Dated at Ashley, North Dakota, this 16th day of May, 1901. By the court, W. S. Lauder, Judge."

When this proceeding came on to be heard before this court, counsel for the defendants moved to quash the writ upon the ground that the petition filed by the relator shows upon its face that the relator is entitled to no relief. This motion need not be further mentioned except to say that the same was denied, and thereafter the case was submitted to this court for determination upon the merits, and in disposing of the case this court has considered, in

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addition to the papers embodied in the record proper, the affidavits and counter affidavits before mentioned. Said affidavits have reference wholly to a controversy of fact concerning what was said in open court respectively by the presiding judge and the relator on the first day of said term of the district court regarding the further prosecution of said criminal action by the relator, especially as to the attitude assumed by the relator with reference to the further prosecution of that action. The affidavits submitted in behalf of the relator are unanimous in their statements to the effect that after the trial court had orally announced its decision overruling said reasons and grounds as filed by the relator, as above set out, and had announced its decision declaring that said criminal action should not be dismissed, but that the same should be further prosecuted, that the relator then and there, upon hearing said decisions, said and stated to the court, in substance, that he, the relator, would proceed to prosecute the case, and that the relator then used the following words: "Well, I will file the information as soon as I can prepare it, but I will ask the complaining witness to verify it;" or used other words of the same import as those above quoted. On the other hand, the affidavits of Judge Lauder and of A. P. Guy positively deny that such words as those quoted above, or other words of the same import, were there used by the relator, and deny in substance that the relator at any time on the first day of said term, or before the appointment of said Larsen as state's attorney pro tem., offered to frame an information or otherwise act in behalf of the state in prosecuting said criminal action; but in neither of said affidavits filed in behalf of the defendants is the statement made that the relator in terms refused to prosecute said action. But, on the contrary, it is alleged in Judge Lauder's affidavit that "from the disclosures there made, he, as presiding judge of said court, became convinced that the said Clyde did not intend in good faith to prosecute said action." Briefly stated, the relator's affidavits are to the effect that, while the relator, for reasons given in writing and filed with the clerk, was opposed to the further prosecution of the criminal action, that he at no time refused to prosecute the same, but, on the contrary, expressly offered to prosecute the same. The counter affidavits flatly deny that the relator offered to prosecute the criminal action, but do not, in terms, allege that he refused to do so. But the written order made by Judge Lauder and handed by him to the clerk after court adjourned for the term, and which is above set out at length, embraces the following language: "And said state's attorney in open court stated that in his opinion the said defendant should not be prosecuted, and refused to proceed with the prosecution of said case."

In justice to both parties we have briefly, but carefully, stated the issues of fact presented by the conflicting affidavits; but, for the purposes of deciding the case, and for such purposes only, we shall resolve the controverted questions of fact in favor of the

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defendants. In the judgment of this court it is wholly immaterial whether Judge Lauder made the order of which the relator complains on account of the absolute refusal of the relator to further prosecute the criminal action, or whether, on the other hand, he made the order for the reason that he did not, in view of all the disclosures of the case, deem the relator to be a proper person to conduct the prosecution of said criminal action. Either one reason or the other, in our opinion, affords ample ground for deposing the relator and appointing another attorney to prosecute the particular criminal action in question. The common-law rule was that the public prosecutor, the attorney general, had absolute control of criminal prosecutions, and was vested with the responsibility of deciding whether a criminal accusation should or should not be pressed to trial. The right to file a nolle prosequi at any time before trial was a prerogative of the executive branch of the government, and this prerogative was not shared by judicial officers. See Whart. Cr. Pl. & Prac. (9th Ed.) § 383. But the more modern rule, and that adopted in this state, is the reverse of that at common law. In this state, while the prosecutor may file with the court his reasons for not filing an information in a criminal action, it is the province of the court to determine the ultimate question whether the case shall be prosecuted or dismissed. Rev. Codes 1899, § 7984. In such cases it is optional with the court to direct either the state's attorney or another attorney appointed by the court to file an information and bring the case to trial. In the case at bar it appears that the trial court was not satisfied with the reasons of the state's attorney filed with the clerk for not filing an information in the criminal action, and overruled such reasons. On reaching such conclusion the trial court proceeded to appoint another attorney to prosecute said criminal action. The statute does not, in terms, make it the duty of the trial court in such cases to spread upon the record any grounds or reasons for appointing an attorney other than the state's attorney to conduct the prosecution; but it is doubtless proper to do so, and we are of the opinion that it would be a legitimate exercise of discretion to appoint an outside attorney in such cases if the trial court should reach the conclusion that the state's attorney of the county for any reason was not a proper person to prosecute the case, and this course would be clearly proper in case of the refusal of the state's attorney to file an information or to prosecute a case. Hence we have no doubt that the court, in deposing the state's attorney and in appointing Larsen to prosecute the criminal action against Quatier, acted strictly within the limits of its discretion. We are equally clear that the writ of certiorari would not have issued in this case, and would, if issued, be quashed, if the writ were invoked for the purpose of annulling the order of May 14th or of May 16th, as made and entered in the mintues of the district court, and whereby the relator was deposed as prosecutor

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and Larsen was appointed to prosecute the action against Quatier. But the writ was not issued for any such purpose. On the contrary, it was issued to bring before this court another order, i. e., that dated on the 16th, and filed after court adjourned on the 17th day of May, 1901, a copy of which is annexed to and forms the principal basis of the relator's petition for the writ. The order filed after the court adjourned for the term is of a different character, and embraces a feature not contained in either of the said orders of the district court as entered in its minutes on May 14th and May 16th.

The new feature embraced in the written order filed with the clerk contained this language: "And the auditor of said county is hereby directed to retain from the salary of said state's attorney of McIntosh county the sum of one hundred dollars." This feature, it will be noticed, is one not suggested in the previous orders of the court, and it is conceded that the relator never had an opportunity to be heard upon the matter of deducting Larsen's compensation from relator's official salary. Upon this state of facts this court is confronted by the question whether the trial court acted within the limits of its authority in making the particular order complained of, i. e., that last above quoted. The order complained of purports to deplete the official salary of the relator in the sum of $100. This drastic remedy was sought to be applied by a summary ex parte order made by the district court. If the power exists to make such an order it will be found in section 1986, Rev. Codes 1899. A careful perusal of that section discloses the fact that the authority to deplete the salary of a state's attorney is not a discretionary authority, but, on the contrary, the power is mandatory, and one which the law requires to be exercised absolutely when either of the prerequisite conditions exist. When either of the specified conditions exist the district court is required to act by appointing a prosecutor pro tem., and in all such cases the compensation of the appointee is required to be deducted from the salary of the state's attorney. It is obvious that this severe statute should receive at the hands of the courts a strict construction, and in no case not clearly within its letter and spirit should the statute be held to apply. The statute reads: "The district court whenever there shall be no state's attorney for the county or when the state's attorney is absent or unable to attend to his duties may, when necessary appoint," etc. In the case at bar McIntosh county had a state's attorney, and it is conceded that its state's attorney was not absent from the session of the court in question; and hence this section of the statute did not authorize the appointment of Mr. Larsen as acting state's attorney, unless the relator was in fact "unable to attend to his duties." There is no claim made by the defendants that the relator was at the time in question "unable" to perform his duties on account of either bodily or mental disability, or otherwise unable. He was neither sick nor insane, nor disqualified

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by intoxication. In fact no suggestion can be found in this record leading to the conclusion that the relator was at any time "unable to perform his duties." Precisely the opposite appears. He was not only present and able to act, but he did act in the criminal action in question. The grand jury of the county had not returned an indictment against Quatier. In such cases no more important duty devolves upon state's attorneys than that of ascertaining from the facts, circumstances, and evidence, whether or not an information should be filed. If, upon such examination, the conclusion is reached that no information should be filed, the statute in express terms makes it the duty of the state's attorney to "make, subscribe and file with the clerk * * * a statement in writing setting forth his reasons in fact and in law for not filing an information." Section 7984, Rev. Codes 1899. We have seen that the state's attorney has performed this duty in the case of Quatier, and that he reached the conclusion that no information should be filed in that case. It is true that the trial court, acting within its powers, overruled the reasons filed by the state's attorney, and appointed an attorney to prosecute that case, but these facts do not operate to confer any power upon the district court to enter an order depleting the official salary of the state's attorney. Instead of showing that the state's attorney was "unable" to act in Quatier's case, the facts narrated in the record demonstrate that he was both able and willing, and also that he did in fact, act in that case.

We have assumed for the purposes of the case that Judge Lauder's version of the facts is correct, and that the relator refused to file an information and refused to prosecute the criminal action in question. Such refusal, if willful, would constitute a misdemeanor under section 7363, Rev. Codes 1899, and it would also render the relator liable to prosecution for professional misconduct. See *In re Voss* (N. D.) 90 N. W. Rep. 15. For such misconduct the relator could also be removed from office by a proceeding instituted in the district court for that purpose. See section 7838, Rev. Codes 1899. It would seem that these provisions of the statute were sufficient to operate as deterrents, and that the same will afford ample remedies for any professional or official misconduct of which the state's attorney can well be found guilty. At all events, the legislature has not seen fit to subject any of this class of officers who may be guilty of professional or official misconduct to further penalties and forfeitures, such as were attempted to be imposed upon the relator. Under the statute deductions may be made from the salary of the state's attorney when he is absent, or when he is laboring under a disability, physical or mental, which renders him "unable to perform his duties," but the lawmaker has not declared, and we think could not constitutionally declare, that the district court should have the arbitrary authority to deduct from the salary of a state's attorney guilty of official misconduct any sum or amount which that tribunal might see fit to exact by an ex parte order made for such

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purpose. It is a serious matter to charge an officer with the crime of official misconduct, and in this state no officer can be subjected either to discipline or to penalties, civil or criminal, for misconduct in office, until he has had an opportunity to defend himself before a court of competent jurisdiction. Our conclusion is that the mere fact, conceding it to be a fact, as claimed, that the relator acted in bad faith in filing his reasons for not prosecuting Quatier, and if it is a fact that he refused to prosecute, as defendants claim, then his refusal to prosecute, even if done willfully and corruptly, did not confer upon the district court any authority whatever to order a deduction to be made from the relator's salary. The right to appoint Larsen and to fix his compensation we do not question under the facts in the record to which we have referred, but the naked right to do this furnishes no excuse for an ex parte order, or any order, deducting $100 from the relator's official salary. No statute permits an appeal from the particular order complained of, and for the substantial injury which necessarily results from such an order, the law, in its ordinary course of administration, affords no plain, speedy, or adequate remedy. In such cases the writ of certiorari may be invoked where inferior courts or tribunals have exceeded their jurisdiction. Section 6098, Rev. Codes 1899. See, also, *State* v. *Rose*, 4 N. D. 319, 331, 333, 58 N. W. Rep. 514.

The order of the district court annexed to the petition herein, and which was filed with the clerk of the district court on May 17, 1901, in so far as the same directs the county auditor of McIntosh county to retain from the salary of the state's attorney of that county the sum of $100, being made without authority of law, was null and void from the beginning, and this court will enter an order annulling the same. All the judges concurring.

(90 N. W. Rep. 564.)

J. W. Perry *vs.* James Hackney.

Purpose of the Australian Ballot Law.

The purpose of the Australian ballot law is to secure a secret ballot to electors, to the end that they may express their choice of candidates uninfluenced by threats, intimidation, or corrupt motives.

Statute Mandatory.

The provisions of the statute governing the conduct of elections will be held mandatory, not only when made so by its express language, but also when the purpose of the lawmaking power would be plainly defeated if its command to do acts in a particular way did not imply an inhibition to do them in any other. In construing such provisions, every positive requirement which, if disobeyed,

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would necessarily defeat the purpose of the requirement, should be held mandatory, and those which do not have that effect should be held directory.

Booths—Duty of Election Inspectors.

Section 521, Rev. Codes, requires inspectors of elections to provide booths where voters may mark their ballots screened from observation, and a guard rail to prevent persons from coming within 10 feet of the ballot boxes and booths. *Held*, that said requirements are but means employed to secure the purpose of the law, viz., a secret ballot, and that a violation of the same does not necessarily destroy the secrecy of the ballot.

Irregularities Not Affecting Result.

In this case the ballots were marked by the electors in secret, the persons voting at the contested precinct were qualified electors, and their votes were counted and canvassed as cast, and the election was free from fraud. It is *held* that the trial court did not err in refusing to throw out the precinct because of the failure of the precinct officers to comply strictly with the statute prescribing the manner of preparing booths and guard rails, inasmuch as such irregularities did not defeat the purpose of the requirement, or in any way affect the result of the election.

Appeal from District Court, Eddy County; *Lauder*, J.

Election contest between J. W. Perry and James Hackney. Judgment for defendant, and contestant appeals. Affirmed.

Marion Conklin, for appellant.

The statute requires booths, in which voters may prepare their ballots, to be so constructed as to screen the elector from observation, with the guard rail so constructed that only persons within the rail can come within ten feet of the booth. This staute is mandatory. § 521, Rev. Codes. § 129 Const. Wigmore Aust. Bal. 50. Black on Interpretation, 339. Potter's Dwarris on Statutes, 228. The statute is introductive of a new law and directs the manner of constructing the booth, and although there are no negative words in it, it must be strictly enforced. *Cook* v. *Keeley*, 12 Abb. Pr. 35; *Attorney Genl.* v. *Kirby*, 79 N. W. Rep. 1009; *Attorney Genl.* v. *McQuade*, 53 N. W. Rep. 944; *Attorney Genl.* v. *Stillson*, 66 N. W. Rep. 388. Where the meaning of a statute is clear, those upon whom compliance devolves have no right to engraft exceptions thereon, or make modifications or depart from the plain letter of the statute. *State* v. *McElroy*, 16 L. R. A. 278.

Thus where all the ballots of one party at a polling place bore a wrong endorsement by which they could be distinguished from other ballots cast at the same place in contravention of the statute the count of them was not justified by the fact that the endorsement was wrong because of a mistake of the county clerk in distributing the ballots to the polling places and that they were cast and received in good faith. *People* v. *Onondaga County Canvassers*, 129 N. Y. 395; *Miller* v. *Schallem*, 8 N. D. 395, 79 N. W. Rep. 865;

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De Goo v. *Fitzsimmonds*, 83 N. W. Rep. 282; *Attorney Genl.* v. *May*, 58 N. W. Rep. 483. When the salutory provisions and regulations in respect to public elections are not substantially observed, the election is void, though it may have been conducted fairly and honestly. *Van Amringe* v. *Taylor*, 12 S. E. Rep. 1005; *Attorney Genl.* v. *May*, 58 N. W. Rep. 483. If the returns for Cheyenne precinct are thrown out, appellant is entitled to the office.

S. E. Ellsworth, for respondent.

The statement of the case as stated contains a portion of the evidence introduced upon the trial. Contestant demands a retrial upon the issues found in the VI finding of fact, only; this in compliance with a statute requiring appellant to specify the question of fact that he desires the supreme court to review. The questions of fact not specified are deemed to have been properly decided by the trial court. *Douglas* v. *Richards*, 10 N. D. 366, 87 N. W. Rep. 600. The findings of fact do not establish presumption of fraud upon the part of the election officers. Such a presumption cannot be inferred but must be clearly proved by the party alleging fraud. 14 Am. and Eng. Enc. L. 190; *Joyce* v. *Joyce*, 5 Cal. 161; *Smith* v. *Yule*, 31 Cal. 180. In cases such as this no intimidation or fraud being shown, and where the views and preferences of the electors were fully expressed, by their ballots, even though the statutory directions for the guidance of the voter and officers were not observed, the law is best served by giving validity and effect to the vote and not by wholly rejecting the same. *State* v. *Gay*, 59 Minn. 6, 60 N. W. Rep. 676; *In re White*, 28 S. W. Rep. 542. The voter who has had nothing to do with the preparation of the ballot nor with the matters preliminary to election should not be deprived of the right to have his vote counted, because of the errors or wrongful acts of the election officers. McCreary on Elections (4 Ed.) § § 706, 724; *Hankey* v. *Bowman*, 84 N. W. Rep. 1002; *Atkinson* v. *Lorbeer*, 111 Cal. 419, 44 Pac. Rep. 62; *People* v. *Prewett*, 56 Pac. Rep. 617; *State* v. *Sadler*, 58 Pac. Rep. 284; *Meyer* v. *Van De Vanter*, 41 Pac. Rep. 60. If the statute simply provides that certain acts shall be done within a particular time or in a particular manner and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do and directory if they do not affect the merits of the election. McCreary on Elections (4 Ed.) § § 225, 227; *Parvin* v. *Wimberg*, 130 Ind. 561, 30 N. W. Rep. 790. It is only those provisions of the statute relating to the time and place of holding elections, the qualification of voters and such others as are made prerequisites to the the validity of an election that are held to be mandatory; all others are directory, and failure to observe them, caused by ignorance or mistake and not resulting in manifest fraud does not afford grounds for rejecting the entire vote of the precinct. *Russell* v. *McDowell*, 23 Pac. Rep. 183; *Atkinson* v. *Lorbeer*, 44 Pac. Rep. 162; McCreary

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on elections, § 228. Tested by these rules § 521 is not mandatory. It consists of directions for the guidance of election officers and refers wholly to the details of the manner of conducting the elections. A penalty is prescribed for the corrupt violation of the statute by election officers. § § 558, 560, Rev. Codes. The aim and purpose of the law is to secure to qualified voters an untrammeled expression of their will and if insured a correct record and return of the vote, it does not follow that because absolute secrecy is not observed that the purpose of the law in not attained. Those votes marked by the electors without entering the booths at all may legally be counted. *Hall* v. *Schoenecke,* 128 Mo. 661, 31 S. W. Rep. 97; *State* v. *Gay,* 60 N. W. Rep. 676; *Bowers* v. *Smith,* 17 S. W. Rep. 761; *State* v. *Norris,* 37 Neb. 299, 55 N. W. Rep. 1086; *Russell* v. *McDowell,* 23 Pac. Rep. 186; *Parvin* v. *Wimberg,* 30 N. W. Rep. 790; *Baltes* v. *Farmers' etc.,* 83 N. W. 83; *Seymour* v. *City,* 33 Pac. Rep. 1059; McCreary on Elections, 518-524. If possible the poll should be purged and the legal votes should not be suppressed by reason of the malconduct of the officers of election. *Chamberlain* v. *Woodin,* 24 Pac. Rep. 177; *Lloyd* v. *Sullivan,* 9 Mont. 577; 24 Pac. Rep. 218; *Blue* v. *Peter,* 20 Pac. Rep. 442; *State* v. *Malo,* 22 Pac. Rep. 349; *State* v. *Fullinton,* 22 Pac. Rep. 378.

YOUNG, J. This is an election contest. J. W. Perry, the contestant and appellant, and James Hackney, contestee and respondent, were opposing candidates for the office of county auditor of Eddy county at the November 6, 1900, election. The canvass of the official precinct returns by the county canvassing board showed that James Hackney had received 388 votes for said office, and that the contestant had received 346 votes, or a majority for the contestee of 42 votes. In pursuance of such canvass, a certficate of election was issued to the contestee, whereupon the contestant initiated this contest under the provisions of article 12, c. 8, Pol. Code, being § § 563-575, Rev. Codes, inclusive. The contestant, in his notice of contest, challenges only one precinct, viz., Cheyenne precinct. It is his contention that the vote of this entire precinct should be thrown out because of certain irregularities, which we shall hereafter refer to. Excluding the vote of Cheyenne precinct, the contestant received 309 votes and the contestee 291 votes, or a majority for the contestant of 18 votes. The vote of Cheyenne precinct, as officially returned and canvassed, gave the contestee 97 votes and the contestant 37 votes, which, added to the unchallenged votes of the other precincts, gave the contestee a majority of 42, as hereinbefore stated. The trial court made six findings of fact, covering all of the facts in issue, and as a conclusion of law therefrom found that "the vote of Cheyenne precinct, as returned by said election board, was properly counted and included in the abstract of the board of canvassers of said county; and a certificate of election to the office of county auditor, based on said abstract, was properly

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issued to the contestee, James Hackney." Judgment was entered dismissing the action. The contestant has appealed from the judgment.

A statement of case was settled, in which the "contestant demands a retrial upon the issues found in the sixth finding of fact." It is urged by counsel for respondent that the demand for a retrial is not sufficiently specific to authorize a review by us of the evidence upon any question of fact. We find it unnecessary to pass upon this objection. The sixth finding relates to the conduct of the election officers in Cheyenne precinct. It is not contended by counsel for appellant that any illegal votes were cast or canvassed, or that there is any evidence of actual fraud or bad faith on the part of the election officers of that precinct. On the other hand, the contrary is conceded in their brief. His objection to the sixth finding, which is made a part of his demand for a review, and limits the scope of the review demanded, is "that the facts found by the trial court in the third, fourth, and fifth findings of fact establish a presumption of fraud upon the part of the election officers and others, which is not rebutted by any evidence in the case, and necessarily affected the result of said election—"The trial court found that there were cast in Cheyenne precinct, for the contestant and contestee, respectively, the number of votes returned by the precinct officers, and canvassed by the county canvassing board as before stated, and that the persons casting the same were qualified electors of said precinct. The correctness of these findings is not challenged by the contestant. His sole contention is that all of the votes cast in Cheyenne precinct were void, and should not be counted, because of the failure of the election officers of that precinct to comply with some of the provisions of section 521, Rev. Codes, relating to the manner of conducting elections. The particular provisions of the section relied upon are as follows: "The inspectors of elections shall provide, in their respective polling places a sufficient number of booths or compartments which shall be furnished with such supplies and conveniences as to enable the voter conveniently to prepare his ballot for voting, and in which electors may mark their ballots, screened from observation, and a guard rail with an opening so constructed that only persons within such guard rail can approach within ten feet of the ballot boxes or the booths or compartments herein provided for." The election in Cheyenne precinct was held in a school house, which was 35 feet long and 24 feet wide. Prior to the opening of the polls, the precinct officers arranged the room for election purposes in the following manner: An inclosed space was made at the north end of the building by placing a row of school desks across the building, with a single opening for entrance and exit, forming an inclosed space 10 feet wide and 24 feet long. In this inclosure the voting booths, ballot boxes, and all other furniture and supplies used in said election were placed. The booths were placed side by side, with the back against

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the east wall of the building. The booths faced the inclosure, and were open, and without door or screen. The ballot boxes and booths were less than 10 feet from the row of seats used as a guard rail, and the booths were less than 10 feet from the election officers stationed within the enclosure. While engaged in marking his ballot, the body of each voter was in full view of the election officers and persons standing within the inclosed space and those standing near the row of seats forming the guard rail, and partly so to persons within the room. "The ballots, when laid upon the shelf across the booth for the purpose of marking, were screened and concealed from the view of the election officers and all other persons in the room by the body of the voter and the projecting side of the booth. The elector could have, had he been so disposed, so displayed his ballot by holding it up against the back of the booth in such a manner that the election officers and others in the immediate vicinity, both within and without the inclosed space, could have seen what candidates he was marking his ballot for." During the day one or two persons other than the election officers and the electors on their way to vote were allowed within the inclosed space, and at times during the day candidates and other persons occupied positions outside the row of seats constituting the guard rail, and within less than 10 feet of the ballot boxes and booths. The conditions as above stated continued during the day. The sixth finding of fact, which is the only one questioned in any way by the appellant, is that: "The said voting compartments were so placed with the back to the wall and open part toward the room, and the booths and ballot boxes within less than ten feet from the guard rail, by the election officers, through ignorance and misconstruction of the law relating thereto, and in the honest belief that it was proper to so arrange the booths that the elector would be in view of the election officers while marking his ballot; that the election officers acted in apparent good faith, and not from fraudulent or corrupt motives; and that it does not appear that any of the acts aforesaid in any manner affected the result of said election in said precinct." As before stated, the only criticism of this finding is that "the facts found by the court in the third, fourth, and fifth findings of fact establish a presumption of fraud on the part of the election officers and others." This objection presents a question of law only, and does not call for a review of the testimony relating to the facts embraced in said finding.

The question presented for our determination is the correctness of the legal conclusion of the trial court that the votes of Cheyenne precinct were properly included in the official canvass by the county canvassing board. Error is properly assigned thereon in appellant's brief. It is the contention of appellant's counsel that there was such a failure to comply with the requirements of section 521, above quoted, in respect to the arrangement of the guard rail and booths, as to vitiate the entire vote of the precinct. Briefly

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stated, they contend that the provisions of said section are mandatory, and that a violation of said section in any particular, however slight or inconsequential, renders the election void. We are unable to so interpret the legislative purpose. At the outset we are met by the important fact that the legislature has not in express language declared that a violation of the provisions referred to shall be fatal to the election. The legislature has not, however, been silent as to the consequence of a violation of all of the provisions of the election law. In section 524 it is provided that in the canvass of votes any ballot which is not indorsed by the official stamp and initials shall be void, and shall not be counted. This mandate is imperative and explicit, and requires the exclusion of all votes not so stamped and initialed. *Miller* v. *Schallern*, 8 N. D. 395, 79 N. W. Rep. 865. Where a statute in terms declares that a violation of its provisions renders acts done thereunder void, there is no occasion for construction, and courts will hold the same mandatory in obedience to the expressly declared intention of the lawmaking body, without regard to their views as to the propriety of the same. As has already been said, the legislature of this state has not declared that a failure by the precinct inspectors to provide booths and guard rails in all respects as required by section 521, Rev. Codes, shall render the election void. The statute under consideration is, then, not in terms mandatory; but it is well settled that the employment of express words is not always necessary to give it that character. "Where the aim and purpose of the lawmaking power would be plainly defeated if the command to do the thing in a particular manner did not imply an inhibition to do it in any other, no doubt can be entertained as to the mandatory character of the statute." 23 Am. & Eng. Enc. Law, pp. 453, 454, and cases cited. The proper test for distinguishing mandatory from directory provisions in election laws is well stated by the supreme court of Indiana in *Parvin* v. *Wimberg*, 130 Ind. 568, 30 N. E. Rep. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254, as follows: "If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts, whose duty it is to enforce the law as they find it, must so hold, whether the particular act in question goes to the merits or affects the result of the election or not; for such a statute is mandatory, and the court cannot enter into the question of its policy. On the other hand, if a statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits." On the same subject the supreme court of Missouri in *Bowers* v. *Smith*, 111 Mo. 45, 20 S. W. Rep. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491, said: "If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence

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of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial. It has been sometimes said, in this connection, that certain provisions of election laws are mandatory and others directory. These terms may, perhaps, be convenient to distinguish one class of irregularities from the other. But, strictly speaking, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview. But it does not, therefore, follow that every slight departure thereform should taint the whole proceedings with a fatal blemish. Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end; and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voters' choice." As was well observed by the Missouri court in the case just referred to, strictly speaking, all of the provisions of the law are mandatory in the sense that they impose a duty of obedience upon those who come within their purview. In the case under consideration it cannot be urged successfully that the inspectors had a discretion to exercise as to the arrangement of the booths and guard rails. It was their imperative duty to comply with the requirements of section 521 in reference thereto. The command of the legislature in said section is to be obeyed. A willful violation of the same is made a misdemeanor, and subjects the offender to both fine and imprisonment. Section 558, Rev. Codes. Was it the legislative purpose that every violation of the provisions of section 521, supra, by the precinct officers, however innocent and inconsequential as to the merits of the election, should be followed by a more far-reaching result than the punishment of the offending officers, namely, the disfranchisement of all the electors of the precinct, as contended for by the contestant? A negative answer must be given to this question. The legislature has refrained from the use of any language indicating such an intention. The violation of duty in this case was by the officers conducting the election, and not by the electors, and the latter were not in fault. The weight of judicial opinion is to the effect that, in the absence of fraud, a voter, who has nothing to do with the preparation of the ballots or matters preliminary to the election, should not be deprived of his right to have his vote counted because of the wrongful act of the election officers. McCrery, Elect. § § 706, 724, and cases cited. While conceding the correctness of the foregoing as a general rule, counsel for contestant contend that it is not applicable, for the reason that, as they contend, the violation in

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this case was not a mere irregularity, but went to the very essence of the election, viz., to the secrecy of the ballot, and therefore vitiated the election; and in this connection cite section 129 of the state constitution, which provides that "all elections by the people shall be by secret ballot, subject to such regulations as shall be provided by law." It is plain that this provision is not self-executing. As was said by this court in *Miller* v. *Schallern*, 8 N. D. 395, 400, 79 N. W. Rep. 865: "The last clause of section 129 expressly looks forward to legislation, and declares that the voting privilege is to be regulated, and in terms is to be 'subject to such regulations as shall be provided by law.'" It is a command to the legislature to provide an election system which shall embrace a secret ballot. This mandate of the constitution was obeyed by the legislature in the enactment of the present Australian ballot law. It cannot be doubted that the controlling purpose of the Australian ballot law is to secure a secret ballot, to the end that the elector may fully express his choice of the candidates to be voted for, uninfluenced by threats or intimidation, and that corruption of his vote may be prevented. The true rule is that: "Every positive requirement, which, if disobeyed, would necessarily defeat this object, should be held mandatory. But such as do not have that effect should be treated as directory, and a failure by the elector to strictly comply therewith should not be held to invalidate the vote if the spirit of the law in the particular case is not violated." Such is the holding in *Hall* v. *Schornecke*, 128 Mo. 661, 31 S. W. Rep. 97, in which the court construed a provision of the Australian ballot law requiring the voter, after receiving his ballot, to retire alone to one of the booths to prepare his ballot. In that case six ballots were prepared without entering the booths. The court held the provision to be directory, saying: "The section in question was only intended to give direction for the guidance of voters in voting. The spirit of the law and its purpose require that the ballot shall be secret. That it may be so, booths are provided, in which the ballot shall be prepared for voting. If the spirit of the law is pursued,—that is, if the ballot is in fact a secret one,—the will of the elector should not be defeated, unless expressly done by the statute for a failure to comply strictly with the directions." See, also, *State* v. *Gay*, 59 Minn. 6, 60 N. W. Rep. 676, 50 Am. St. Rep. 389, to the effect that the constitutional secrecy of the ballot does not mean an impossible or impracticable secrecy.

Applying these principles to the case at bar, we are unanimous in holding that the violations complained of under the facts of this case afford no ground for excluding the votes cast in Cheyenne precinct. The derelictions in question were free from fraudulent design, and were without effect upon the merits of the election. No illegal votes were cast, and there is no pretense that the voters did not vote their convictions with the same freedom that they would have had if the guard rail and booths had been arranged strictly in accord with the provisions of section 521, supra. Not only do the findings show that

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the omissions had no effect upon the state of the vote, but they also show that the electors in Cheyenne precinct had a secret ballot within the meaning and spirit of the law. It is true, the statutory mode of guarding its secrecy was not strictly obeyed; that is, the voter was not screened from observation when marking his ballot in the manner contemplated by the statute, and the guard rails were not ten feet from the ballot boxes and booths. But these are mere means of securing a secret ballot, which is the end aimed at, and when that is accomplished the spirit and purpose of the law has been accomplished. By reference to the findings before set out, it will be seen that, while the body of the voter was in full view when in the booth, his ballot, when laid across the shelf in the booth for marking, was concealed by his body and the sides of the booth. He was able to mark his ballot screened from observation, and it does not appear that any ballots were marked otherwise than in secret. To hold that this election was not by secret ballot would be, in our opinion, to subordinate substance to form, and to hold that the means, and not the end, is of paramount importance. We agree with the conclusion of the trial court that the precinct in question was properly included in the abstract of the county canvassing board.

Judgment affirmed. All concur.

(90 N. W. Rep. 483.)

MAXWELL V. WOODHULL *vs.* FARMERS' TRUST COMPANY, *et al.*

Attachment—Property in Hands of Receiver.

In this action both defendants are non-residents of this state, and service was made by publication. The action is brought to recover damages for alleged breach of a contract made between the defendant trust company and tne plaintiff. Long prior to the commencement of this action the defendant George H. Hollister was, by an order made by a competent court of the state of Iowa, appointed receiver of the estate of said trust company; and, after qualifying as such, Hollister took possession of the effects of said trust company, among which were seven interest coupon notes, of the face value of $70 each. Said receiver, after taking possession of the notes in the state of Iowa, brought the same within this state for a lawful purpose, and while the notes were in this state the same were seized by the sheriff under a warrant of attachment issued in this action. Upon motion made in behalf of the defendants, appearing specially, the district court, by its order, vacated the attachment and set aside the service of the summons. *Held*, that the order of the district court was properly made.

Comity Between States.

It is a rule resting upon comity between the states that where a receiver, as such, has obtained rightful possession of personal property within the jurisdiction of his appointment, he will not be deprived of its possession when he takes the property, in the per-

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formance of his duty, into a foreign state. When in a foreign jurisdiction the property cannot be taken by attachment from the receiver's possession by creditors of the insolvent debtor.

Attachment Before Receiver Takes Possession.

An opposite rule would prevail where a seizure of the property is made by a creditor prior to the appointment of the receiver, or prior to his taking possession within the state of his appointment.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Maxwell V. Woodhull against the Farmers' Trust Company of Sioux City, Iowa, and George H. Hollister, its receiver. Judgment for defendants, and plaintiff appeals. Affirmed.

John E. Greene, for appellant, cited no cases.

Ball, Watson & Maclay, for respondent.

If the Farmers' Trust Co. was not the owner of the notes and mortgages in suit they were not subject to attachment, and if an attachment was vacated, whether regularly or irregularly, the appellant could not be injured thereby; if, on the other hand, the property did belong to the Farmers' Trust Co. it was not subject to attachment in the hands of the receivers of that company. Smith on Receiverships, 109, 110; Reno on Nonresidents, 160-163; *Railway* v. *Keokuk Packet Co.*, 108 Ill. 317; *Crapo* v. *Kelly*, 16 Wall, 610; *Torrans* v. *Hammond*, 10 Fed. Rep. 900; *Temple* v. *Glasgow*, 80 Fed. Rep. 441. The appellant is not a resident of this state and the court will not lend him its assistance to enable him to gain a preference in disregard of the receivership proceedings. *Long* v. *Girdwood*, 24 Atl. Rep. 711; *Frank* v. *Bobbitt*, 29 N. E. Rep. 209; *Burlock* v. *Taylor*, 16 Pick. 335; *Gillman* v. *Ketcham*, 54 N. W. Rep. 395; *Bentley* v. *Whittemore*, 19 N. J. Eq. 462; *May* v. *Bank*, 13 N. E. Rep. 806; *Chaffee* v. *Bank*, 71 Me. 514; *Barnett* v. *Kinney*, 147 U. S. 476. An appeal from the order of the district court vacating or refusing to vacate an attachment, the appellate court will not reverse the order appealed from unless there is a clear and convincing preponderance of evidence against the decision of the lower court. *Rice* v. *Jerenson*, 11 N. W. Rep. 549; *Bank* v. *Randall*, 37 N. W. Rep. 799; *Brown* v. *Lumber Co.*, 25 Minn. 461.

WALLIN, C. J. This action was brought to recover damages for an alleged breach of contract, and the summons was served by publication. It is conceded that both of the defendants in the action are nonresidents, and that they reside in the state of Iowa. An affidavit for attachment, stating that the defendants are nonresidents of this state, and that "the defendants have property within this state subject to attachment," was filed with the clerk of the district court, together with the complaint in the action. Upon the filing of the same, a wararnt of attachment issued, and was delivered to the sheriff for service. On the day it was issued, February 8, 1899, the sheriff, under said warrant, attached and took into his possession a certain mortgage upon real estate situated in Cass

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county, N. D., and certain notes secured by said mortgage, consisting of a principal note, together with nine interest coupon notes. The mortgage so attached was made by George Foley and wife, as mortgagors, to one of the defendants in this action, viz., the Farmers' Trust Company of Sioux City, Iowa, and the notes were made payable to said mortgagee. The attachment of said property was made under the conditions hereafter stated. Prior to the seizure under the attachment an action had been instituted in the district court for Cass county to foreclose said mortgage. In said foreclosure action, George Foley and his wife were defendants, the Sioux City Safe Deposit & Trust Company was plaintiff, and the Farmers' Trust Company, one of the defendants herein, was intervenor. It appears that, while the testimony in the foreclosure action was being taken by a referee appointed in that action, the mortgage and all notes in question were offered in evidence, and were received and marked as exhibits by the referee, and that subsequently the referee allowed the attorney for the defendants in that action to remove the mortgage and notes to his office, temporarily, for examination, and that while the same were in the hands of such attorney they were attached, as above stated, and taken into the sheriff's possession. It appears that the mortgage and principal note, with two coupon notes, were delivered to the defendant herein, George H. Hollister, by one W. P. Manly, who was then president of the plaintiff in the foreclosure action, the Sioux City Safe Deposit & Trust Company, to be brought into this state for the purpose of being introduced in evidence in the course of the examination of said Hollister as a witness in the foreclosure action; and the further fact appears that the remaining coupon notes, seven in number, were at the same time put in evidence by the intervenor in that action, the Farmers' Trust Company, in support of its complaint in intervention; and it also appears that said coupon notes were, when introduced in evidence, the property of the defendant herein, the Farmers' Trust Company. The undisputed evidence shows that said mortgage and notes were, soon after their execution and delivery, sold, assigned, and transferred by the said mortgagee, and that by certain mesne assignments and transfers the said mortgage and principal note for $2,000, together with two coupon notes attached thereto, were acquired by, and became the property of, the plaintiff in said foreclosure action. The foreclosure action was commenced on or about the 25th day of April, 1898, and subsequently, and before said mortgage and notes were seized and attached herein, the defendant the Farmers' Trust Company intervened in the foreclosure action, and filed its complaint in intervention in said action, and did so for the purpose of protecting its interests as owner of the said seven coupon notes. The further fact appears that long prior to the commencement of said foreclosure action, and on the 28th day of December, 1896, in an action then pending in the district court for Woodbury county, in the state of Iowa, in which one C. C. Abbott was plaintiff, and said defendant herein, the Farmers'

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Trust Company of Sioux City, Iowa, was defendant, such proceedings were had that the defendant herein, George H. Hollister, was duly appointed as receiver of said Farmers' Trust Company, and after such appointment he qualified and entered upon his duties, and that he was such receiver when this action was commenced, and has ever since been such receiver; that pursuant to such appointment the Farmers' Trust Company transferred to the receiver said seven coupon notes, with other property, and said notes were in the hands of the receiver when he brought the same into this state to be used by the intervener as evidence in said foreclosure action. And the further fact appears that said George H. Hollister, as a witness for the plaintiff in the foreclosure action, brought into this state the mortgage and the principal note and said two coupon notes, and the same were put in evidence, together with the coupon notes, as above stated. The facts as above narrated were duly brought to the attention of the district court upon the hearing of a series of motions made in this action in said court, and to the consideration of which motions we will now give attention.

The defendants in this action, by their attorneys, appearing specially for the purposes of the motion only, upon due notice, moved in the district court "for an order vacating and setting aside the writ of attachment herein issued and levied upon the 8th day of February, 1899, and vacating and setting aside the service of the summons and complaint in said action based upon said levy and said writ of attachment." This motion, which was contested, was heard and decided on August 30, 1899; and on said date an order was made granting the motion, in which the following language was used: "The court states, in granting this motion, that it had not in any way passed upon the contention between the defendants and the Sioux City Safe Deposit & Trust Company with reference to the ownership of the property in question." On the same day and upon the same state of facts, another motion was heard and decided in the district court, in which motion the plaintiff, the intervener, and the referee in the foreclosure action were the moving parties; and they applied to the district court for "an order directing the sheriff of said county of Cass to turn over to said Charles F. McNamara, as referee, the mortgage and notes refererd to." This motion was also granted on August 30, 1899, and the order embraced a statement similar to that above given, to the effect that the question of the ownership of the property attached herein was not decided in passing upon the application to return the attached property to the referee. The further proceedings in this action are recited in the abstract filed in this court, from which we quote as follows: "And thereafter, it appearing to the court and to the parties to this action that the question of the title to the notes and mortgage referred to in the motion papers and affidavits was involved in the said action of the *Sioux City Safety Deposit & Trust Co.* v. *Foley et al.*, and would necessarily be determined therein: Therefore, on August 31, 1899, on plaintiff's request, the plaintiff and defendants

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herein (said defendants appearing specially) agreed in open court that said orders hereinbefore recited should be held in statu quo until the decision of this court in the said case of *Sioux City Safety Deposit & Trust Co.* v. *Foley et al.*, was announced; that is to say, that the rights of neither of the said parties should be in any way affected thereby until the rendering of such decision, and that upon such decision in said action such order should be made by the court as might seem proper. And thereafter, and on or about the 15th day of April, 1900, the court having announced its decision in said last-mentioned case, finding and deciding therein and thereby that said Sioux City Safety Deposit & Trust Company was and is the owner of said notes and mortgages, with the exception of seven coupon notes, which last-mentioned notes were decided to be the property of said Farmers' Trust Company; said seven coupon notes being the same notes particularly mentioned in the affidavit of Geo. H. Hollister, and said motions being consolidated by consent of all parties: Now, therefore, upon motion of Messrs. Ball, Watson & Maclay, attorneys for the defendants herein, appearing specially for the purpose of this application only, it is ordered that the writ of attachment heretofore issued and levied herein upon the 8th day of February, 1899, be, and the same is hereby, vacated and set aside, and that the service of the summons and complaint in this action, based upon said levy and said writ of attachment be, and the same is hereby, vacated and set aside, and that said defendants have their motion costs herein, taxed at the sum of $20." From the order last above described, vacating the attachment and setting aside the service of the summons and complaint, plaintiff has appealed to this court, and the making of said order is assigned in this court as error.

The controlling facts may be summarized as follows: First. That the defendants in this action were at all times in question non-residents, and that fact was stated in the affidavit for attachment; and it was further alleged in said affidavit that, when the affidavit was made, the defendants had property within this state subject to seizure by attachment. Second. That, as a matter of fact, the defendants, when the affidavit was made and the attachment was levied, had certain personal property in this state, to-wit, seven coupon notes, of $70 each, and that such property was brought within the state by the defendant Hollister, as receiver, and that the ownership of said coupon notes was vested in Hollister in trust, as receiver, and was held in trust for the use and benefit of his co-defendant, the Farmers' Trust Company. Third. That the residue of the property seized and attached herein was, when seized, the property of a stranger in this action, viz., the plaintiff in the foreclosure action. Fourth. That the property, when taken, had been put in evidence, and was in the possession of the referee, but was

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when seized temporarily in the custody of the attorney of the defendants in the foreclosure action.

In this court the question of law presented is whether the order appealed from is erroneous. The recitals in the abstract, as above quoted, strongly indicate that the trial court, as well as counsel on both sides, attached great importance to the disputed question of the ownership of the property seized under the attachment. This view of court and counsel is clearly manifested in the stipulation made in open court on August 31, 1899, which, in effect, was an agreement that the previous orders of the court (those made on August 30th) should be held in abeyance and not be acted upon until the court had reached a final decision in the foreclosure action, in which action the ownership of all the property was directly in issue. Besides, the express terms of the final order are ample to indicate that the trial court bases such order upon its conclusions in the foreclosure action touching the title of said property. The order declares, "And therefore, and on or about the 15th day of April, 1900, the court having announced its decision in said last-mentioned case, finding and deciding therein and thereby that said Sioux City Safety Deposit & Trust Company was and is the owner of said notes and mortgages, with the exception of seven coupon notes, which last-mentioned notes were decided to be the property of said Farmers' Trust Company," etc. Upon this recital of grounds the court below proceeded to enter its order vacating the writ of attachment, and setting aside the service of the summons and complaint. It is our opinion that the order cannot be sustained upon any such foundation. The court found and decided in the foreclosure action that at the time the affidavit for attachment was filed, and when the levy was made, the defendant in this action, Farmers' Trust Company, who is conceded to be a nonresident, owned and had in Cass county, in this state, certain personal property, viz., seven coupon notes, of the face value of $70 each. Certainly such finding directly corroborates the decisive fact embodied in the affidavit upon which the wararnt issued. Nor does the fact that the officer, in seizing the defendants' property under the warrant, also seized and took into his possession certain other property not owned by the defendants, operate to defeat the attachment of defendants' property, or to disprove any fact upon which the warrant issued. It follows, therefore, in our opinion, that, if the order appealed from is to be sustained by this court, other grounds must be found upon which to rest such conclusion.

But we find no difficulty in affirming the order appealed from upon another ground. The complaint herein alleges "that on or about the 28th day of December, A. D. 1896, in proceedings duly instituted in a court of competent jurisdiction within said state of Iowa for the purpose of having appointed a receiver of all the property and assets of said corporation, the said defendant the Farmers' Trust Company was duly adjudged insolvent, and on or about the last-mentioned date the defendant George H. Hollister

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was by such court duly appointed as such receiver; that ever since such appointment the said defendant Hollister has been, and now is, the duly qualified and acting receiver of all the property and assets of said defendant corporation." These averments of fact in the complaint are conceded to be true by the defendants, and the undisputed evidence submitted on the hearing of the motions in the court below shows that, after qualifying as receiver, the defendant Hollister brought all the property levied upon into this state, including the seven coupon notes, which coupon notes he had received in trust from the estate of his codefendant, and which were, when brought into this state, in his personal possession as receiver; nor did the receiver place said trust property in the hands of the referee for any purpose, except to be used by the court as evidence in support of an action in which his cestui que trust was a party, and in which said coupon notes were necessarily offered in evidence. Upon this state of facts, counsel for the respondents contend that the order dissolving the attachment and setting aside the service of the summons should be affirmed. In our opinion, this contention is sound, and must be sustained. It is entirely elementary that the possession of property by a receiver is, in the eye of the law, regarded as the possession of the court which appointed the receiver, and hence such property, being in custodia legis, cannot be seized by attachment or execution when in the hands of a receiver. See Beach, Rec. (2d Ed.) § 718; *Adams* v. *Haskell,* 6 Cal. 114, 65 Am. Dec. 491; High, Rec. § 151. But it is also a familiar rule of law that powers which are exercised or conferred by courts are limited, and such powers cannot ordinarily be exercised beyond the boundary of the territory over which the court has jurisdiction. In view of this restriction upon judicial authority, the question has been much mooted, where a receiver, after taking possession of property belonging to the insolvent estate, removes the same personally or by his agents to another state, whether such property can be subjected to seizure by attachment or execution in actions brought in such state against the beneficiary of the trust estate. But the decided weight and trend of the adjudications are to the effect that under such conditions the property so brought within a state cannot be seized by creditors. This rule rests upon the doctrine of comity, and also, it seems, upon article 4, § 1, of the constitution of the United States, which reads: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." Under this provision and the acts of congress it has been held "that the same effect is to be given to the record in the courts of the state where produced as in the courts of the state from which it is taken." See *Crapo* v. *Kelly,* 16 Wall. 610, 21 L. Ed. 430. The case cited arose under the insolvency laws of the state of Massachusetts, but the same rules applicable in such cases apply in receiverships. As supporting the better doctrine, see

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Beach, Rec. § 247; *Chicago, M. & St. P. Ry. Co.* v. *Keokuk Northern Line Packet Co.*, 108 Ill. 317, 48 Am. Rep. 557; *Pond* v. *Cooke*, 45 Conn. 126, 29 Am. Rep. 668; *Cagill* v. *Wooldridge*, 8 Baxt. 581, 35 Am. Rep. 716; *Bagby* v. *Railway Co.*, 86 Pa. 291; *Humphreys* v. *Hopkins*, 81 Cal. 551, 6 L. R. A. 792 (dissenting opinion), cited, with note, in 15 Am. St. Rep. 76. See, also, Reno, Nonres. p. 186, § 153. In the case from Illinois (108 Ill. 317, 48 Am. Rep. 557), a receiver appointed in the state of Missouri took into his possession, as receiver, a certain barge, and thereafter chartered the same to a steamboat company. The steamboat company took the barge to Quincy, Ill., and there it was attached by the plaintiff in a suit against the insolvent. In that case the superior rights of the receiver were fully recognized, and the court said in the syllabus of the case, after stating the general rule as to the territorial limits of jurisdiction: "But where a receiver has once obtained rightful possession of personal property situate within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession, though he takes it, in the performance of his duty, into a foreign jurisdiction. While there it cannot be taken from his possession by creditors of the insolvent debtor who resides within such jurisdiction;" citing *Killmer* v. *Hobart*, 58 How. Prac. 452. Under these authorities, the rule is established that the property of a nonresident defendant cannot, while the same is in the hands of a receiver, if brought within this state for a lawful purpose, be seized under attachment proceedings in an action brought against such nonresident in this state. The same cases announce the opposite rule where the property of a nonresident is seized within the state prior to the date of the appointment of a receiver in another state, or is seized before the receiver takes actual possession of the property within his own state.

Our conclusion is that the order dissolving the attachment was properly made, and the same will therefore be affirmed. All the judges concurring.

(90 N. W. Rep. 795.)

GAAR, SCOTT & CO. *vs.* J. A. SORUM.

Taxation Personal Property—Date.

The general revenue laws of this state, embodied in chapter 126, Laws 1897, designate April 1st as the date for determining the taxability of personal property and its value for the purposes of taxation. Personal property not then in existence or brought into the state after such date is not taxable for the current year.

Distress—Payment under Protest—Recovery Back of Money Paid.

In this action the trial court sustained a general demurrer to the complaint, which stated a cause of action for the recovery of money

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paid by the plaintiff under protest, and under the coercion of a seizure of its property by defendant, for an alleged tax assessed by the taxing officers of Traill county for the year 1900 upon property brought into the state by plaintiff on April 27th of that year. *Held* error.

Appeal from District Court, Traill County; Pollock, J.

Action by Gaar, Scott & Co. against J. A. Sorum, as sheriff. Judgment for defendant, and plaintiff appeals. Reversed.

Turner & Lee; Newman, Spalding & Stambaugh, for appellant.

Personal property brought into the state after April 1st in any year is not taxable for that year, for the reason that the statute fixing the date for listing, assessment and valuation requires, not only that the property be valued as of that date but that it be listed in the name of the person owning it on that date; and also that it have a status as taxable property in this state on that day; otherwise, the rule of uniformity required by the constitution and sought to be established by the laws would be violated. § 176 Const.; § § 1181, 1189, 1190, 1211, 1212, 1199, 1203 and 1182, Sub. 10, Rev. Codes.

In 1890 our legislature adopted the Revenue Tax Laws of Minnesota, eliminating the provision requiring judgment and sale thereunder. In 1895 the provisions of the Compiled Laws were reenacted and in 1897 the law of 1890 was restored. The Minnesota tax law has been construed, *Martin* v. *Drake,* 41 N. W. Rep. 942, 40 Minn. 137; *Knowlton* v. *Sups.,* 9 Wis. 378; *State* v. *Winnebago County,* 11 Wis. 40; *Hayden* v. *Rowe,* 28 N. W. Rep. 187; *Day* v. *Pelican,* 69 N. W. Rep. 371; *Pa. Coal Co.* v. *Porth,* 23 N. W. Rep. 105; *Dodge* v. *Nevada Nat. Bank,* 109 Fed. Rep. 726; *Southern Ins. Co.* v. *Board,* 21 So. Rep. 914; *Mygatt* v. *Washburn,* 15 N. Y. 316; *Clarke* v. *Norton,* 49 N. Y. 243; *Overing* v. *Foote,* 65 N. Y. 263; *People* v. *Commis.,* 91 N. Y. 593. The foregoing cases are decided under similar statutory constitutional provisions. The state under its constitution may, by classification, fix different dates for different classes of property. *Wis. Cent. Ry. Co.* v. *Lincoln,* 15 N. W. Rep. 121; *Nelson Lumber Co.* v. *Loraine,* 22 Fed. Rep. 54. In every instance the statutory date fixed is taken as the criterion to determine what personal property is taxable and to whom it should be taxed. Some arbitrary rule of date has been found necessary, and, although, in many instances working hardship and inequality to some extent in taxation, it has been found the best regulation that could be established by law. *Board* v. *Wilson,* 24 Pac. Rep. 563; *Shaw* v. *Dinnie,* 5 Gilm. 418; *Hunnewell* v. *Cass Co.,* 22 Wall. 477; *People* v. *Kohl,* 40 Cal. 127; *State* v. *Hardin,* 34 N. J. L. 79; *Field* v. *City,* 10 Cush. 65; *De Arman* v. *Williams,* 5 S. W. Rep. 904; *Lamb* v. *Rawles,* 33 Ind. 386; *Ry. Co.* v. *State;* 13 Lea 248; *Sully* v. *Poorbaugh,* 45 Ia. 455; *Wangler* v. *Black Hawk Co.,* 9 N. W. Rep. 314; *Johnson* v. *Lyon,* 106 Ill. 64;

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Graham v. *Chautauqua Co.*, 2 Pac. Rep. 549; *Hull* v. *Johnson*, 63 Pac. Rep. 455. The words "Taxation by uniform rule," as used in § 176, means by one and the same unvarying standard. *Exchange Bank* v. *Hines*, 3 Ohio St. 15, and cases above cited.

J. F. Selby, for respondent.

The proviso in § 1211, Revised Codes, nowhere appears in the 1878 revenue laws of the state of Minnesota; nor does the provision "All personal property, wherever and whenever found between the 1st day of April and the 1st day of June shall be listed by the assessor" appear in the Minnesota statute. The exemption of land from taxation after a certain date under the provisions of their statute was before the supreme court of Wisconsin, and it was there held that the provision of the statute to the effect that real estate might be assessed at any time between the 1st day of May and the time appointed for the sitting of the board of review, was legal and not in conflict with the constitution. *Wis. Cent. Ry. Co.* v. *Lincoln County*, 15 N. W. Rep. 121. Notwithstanding the constitutional provision that all taxation shall be equal and uniform, it is competent for the legislature to provide that property brought into the state subsequent to the taxing date may be assessed for taxation for the then current year. *Kelley* v. *Rhoads*, 51 Pac. Rep. 593; *Kelley* v. *Rhoads*, 63 Pac. Rep. 935; *Hull* v. *Johnson*, 63 Pac. Rep. 455; *Hudson* v. *Miller*, 63 Pac. Rep. 21; *Prairie Cattle Co.* v. *Williamson*, 49 Pac. Rep. 937; *Collins* v. *Green*, 62 Pac. Rep. 813; *Hull* v. *Johnson*, 67 Pac. Rep. 548. Property coming into the state after the regular assessing period may be assessed and taxed by proper statutory provisions without invading the uniformity of the taxation. *Wright* v. *Stinson*, 47 Pac. Rep. 761. If the words "then value" in the proviso to § 1211, Rev. Codes, are given their literal meaning, the proviso would conflict with the general rule of assessing property with reference to its value on April 1st. If it exists as an exception to the general rule established by the statute, the exception must give way to the general rule. *Collin* v. *Green*, 62 Pac. Rep. 813; *Hull* v. *Johnson*, 63 Pac. Rep. 455. This statute has been sustained against the objection that it was special legislation. *Mpls. & Nor. Elev. Co.* v. *Traill Co.*, 9 N. D. 213.

YOUNG, J. The plaintiff is a foreign corporation engaged in the manufacture of threshing machines in the city of Richmond, Ind. This action was brought to recover the sum of $59.22 paid by the plaintiff to the defendant as sheriff of Traill county for an alleged personal property tax assessed by the taxing officers of said county in the year 1900 upon a certain threshing engine and separator, of which the plaintiff was the owner. Payment of the tax in question was made by plaintiff under protest, and under the coercion of a seizure of its property by the defendant sheriff. The defendant interposed a general demurrer to the complaint, and the same was sustained by the trial court. Judgment was ordered and entered

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dismissing the action. Plaintiff has appealed from the judgment, and assigns the order sustaining the demurrer to its complaint as error.

The complaint, in substance, alleges that the property which was the basis of the tax exacted from plaintiff was not in Traill county, or in this state, on the 1st day of April, 1900, but was at plaintiff's factory, at the city of Richmond, in the state of Indiana, on said date; that said property was listed and assessed for taxation in said city and state for said year; that the property in question was not shipped into this state and into the city of Hillsboro, in Traill county, until April 27, 1900; that subsequent to said last-named date it was assessed by the city assessor of said city of Hillsboro for the year 1900, and said assessment returned to the county auditor of Traill county; that the tax in question was based upon the assessment so made and returned. Further reference to the averments of the complaint will not be necessary.

The facts stated present the single question in controversy in this case, which is whether, under the revenue laws of this state, property coming into existence or brought into the state after April 1st in any year is taxable for that year. It is conceded that, if property brought into the state after April 1st is subject to taxation for the current year, the property in question was lawfully assessed, and the complaint does not state a cause of action. If, on the other hand, property coming into the state after April 1st is not taxable for that year, then the sum of money which plaintiff seeks to recover concededly was exacted without authority of law, and the complaint states a cause of action for its recovery. It will thus be seen that the entire controversy is as to the taxability of the plaintiff's property when assessed.

Counsel for plaintiff contends that "personal property brought into the state after April 1st in any year is not taxable for that year." Counsel for defendant, on the other hand, maintains that not only is property which has a situs in the state on April 1st of any year taxable for that year, but that "all personal property, whenever and wherever found, in this state between the 1st day of April and the 1st day of June of each year, is subject to assessment and taxation under the general revenue laws of the state; and this, whether the property was owned in the state on the 1st day of April, or came into the state on or after that date, before the 1st day of June, and during the assessing period." Briefly stated, the position of counsel for plaintiff is that only such personal property as is in the state on April 1st is taxable; whereas, counsel for defendant contends that all personal property having a situs within the state at any time between the 1st day of April and the 1st day of June of any year is subject to taxation for that year, and should be assessed. The solution of the question thus presented turns upon the provisions of chapter 126 of the Laws of 1897, which chapter is now embodied in chapter 18 of the Political Code (Rev. Codes

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1899), under which the assessment in question was made. Counsel for both parties agree that all property which is made taxable by said chapter is required to be listed and assessed with reference to its value on the 1st day of April, and this is undoubtedly a proper construction of the provisions relating to valuation; but, as has been stated, counsel disagree radically on the question as to what property is subject to taxation. It is urged on behalf of the defendant that the legislature has authorized the assessment and taxation of all personal property which has a situs in the state at any time during the assessing period,—that is, between April 1st and June 1st,—without regard to its existence or presence in the state on April 1st, and the trial court so held. An examination of the provisions of the statutes which control this question leads us to a different conclusion.

The revenue laws now in force in this state were borrowed from the state of Minnesota, and were first adopted in chapter 132, Laws 1890, the parent statute being chapter 11, Gen. St. Minn. 1878. The Revised Codes of 1895 repealed the above chapter, and restored the revenue system embraced in the Compiled Laws, which were in force in this jurisdiction prior to 1890. Chapter 126, Laws 1897, our present statute, superseded the Laws of 1895, and restored the original 1890 law, which, as we have seen, was adopted from the state of Minnesota.

It is properly conceded by counsel for defendant that both under the provisions of the Compiled Laws and under the provisions of the Revised Codes of 1895 the power to assess personal property for taxation in each year was limited to personal property situated within this state on the 1st day of April, and that the assessment of personal property was required to be made in the name of the owner on said date at its then value. The language employed by the legislature was clear and explicit, and left no room for cavil as to its purpose to fix upon April 1st of each year as a particular point of time which was to determine the taxability of personal property for each current year. See section 1547, Comp. Laws; section 1182, Rev. Codes 1895. The language of chapter 126, Laws 1897, under which the assessment here in question was made, is somewhat different from that found in the Compiled Laws or in the Revised Codes of 1895, and certain provisions are contained in it which were not embraced in the Minnesota statute from which it was originally taken. It is entirely upon these differences that counsel for defendant bases his claim that a different period for determining the taxability of personal property from that formerly existing has been provided. Before considering the several provisions relied upon to sustain the contention that a change was made in legislation, whereby a new period covering the entire months of April and May was fixed for determining the taxability of personal property in lieu of the single point of time designated by the Compiled Laws and Revised Codes of 1895, to-wit, April 1st

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of each year, it will be necessary to refer to the Minnesota statute from which the statute under consideration was taken. Section 6, c. 11, Gen. St. Minn. 1878, reads as follows: "Sec. 6. All real property in this state subject to taxation shall be listed and assessed every even numbered year with reference to its value on the first day of May preceding the assessment; and all real estate becoming taxable in any intervening year shall be listed and assessed with reference to its value on the first day of May of that year. Personal property shall be listed and assessed annually with reference to its value on the first day of May." The foregoing section was adopted literally by the legislature of this state in the revenue laws of 1890. Section 6, and subdivision 9, § 7, c. 132, Laws 1890. The legislature of 1897 changed the date to April 1st. Aside from this change, the statute then enacted and now in force, although not in the same language, is the same, in substance and effect, as the Minnesota statute above quoted. Section 6, and subdivision 10 of section 7, c. 126, Laws 1897, now known as section 1181, and subdivision 10 of section 1182, Rev. Codes 1899, are as follows (section 1181): "All property subject to taxation shall be listed and assessed every year at its value on the first day of April preceding the assessment." Section 1182, subd. 10: "Personal property shall be listed and assessed annually with reference to its value on the first day of April." The language of the above sections, when considered alone and independently of certain other provisions of the chapter to which we will hereafter refer, expresses the legislative purpose to fix upon April 1st as a point of time for determining the taxability, ownership, and value of both real and personal property for the purposes of taxation. Such was the construction placed upon the provisions referred to by the supreme court of Minnesota in *Martin Co. v. Drake*, 40 Minn. 137, 41 N. W. Rep. 942, decided January 30, 1889, which was prior to their adoption in this state. Mitchell, J., speaking for the court in that case, said: "All tax laws have to fix upon some particular date in the year at which to determine the taxability as well as the ownership and value of property for purposes of assessment and taxation. Our revenue laws have fixed this at the 1st of May. Gen. St. 1878, c. 11, § § 6, 24, 105. Personal property is assessed and taxed with regard to both its value and ownership at that date. Real estate is assessed according to its value at that date. * * * Every man must pay taxes on what he then owns, and at its then value, no matter how short a time he may have owned it, or how soon thereafter it is lost. All property, if in being as taxable property at that date, is liable to taxation for that year at its then value, although it may only have come into being the day before, and may be, in whole or in part, destroyed the day after." The legislature of this state will be presumed to have adopted the provisions referred to, with the construction theretofore given them by the Minnesota supreme court, under the familiar

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rule that "statutes originally enacted in another state, when adopted, are deemed to be taken with the settled construction given them in the state from which they are copied." Suth. St. Const. p. 337, and cases cited in note 2. It is manifest that if the legislature has provided a period of time for determining the taxability of property different from that expressed in the sections above quoted it must be found elsewhere.

Counsel for defendant relies entirely upon the provisions of sections 1189, 1211, Rev. Codes 1899, to sustain his contention that the legislature intended that all property coming into existence or into the state during the assessing period, which extends from April 1st to June 1st, should be assessed for the purposes of taxation for the current year. So far as important to the question at issue, the sections are as follows:

"Sec. 1189. *All personal property wherever and whenever found between the first day of April and the first day of June shall be listed by the assessor, and* in all questions that may arise under this chapter as to the proper place to list personal property, or where the same cannot be listed as stated in this chapter, if between several places in the same county, the place for listing and assessing shall be determined and fixed by the county board; and when between different counties, or places in different counties, by the auditor of the state; and when so fixed shall have the same effect and be as binding as if listed by the assessor as required by this chapter."

"Sec. 1211. The assessor shall perform the duties required of him during the months of April and May of each year, except in cases otherwise provided, and in the following manner, to-wit: * * * He shall make an alphabetical list of the names of all persons * * * liable to assessment of personal property, and require each person to make a correct list and statement of such property according to the prescribed form, which statement and list shall be subscribed and sworn to by the person listing the property with full name; and the assessor shall thereupon determine the value of the property included in such statement and enter the same in his assessment books opposite the name of the party assessed: * * * *provided, that personal property shall be assessed upon view, by the assessor at any time within the limit prescribed by the provisions of this article, at its then actual value regardless of any change of ownership prior to such assessment; but if the owner, factor or agent can show by duly authenticated certificate that the property has been lawfully assessed in any other town, city, village or district in this state for that year, then such property shall not be assessed.*"

Those portions of the sections quoted which are in italics were not contained in the Minnesota statute, but were added by the legislature of this state when the sections referred to were adopted. Do these added provisions create a new and different period for deter-

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mining the taxability of property, as contended for by defendant's counsel? We are of opinion that they do not. A change in the law will not be lightly inferred by mere changes in phraseology. The intent to change must be clearly made to appear. On this point Sutherland on Statutory Construction (at section 256) says: "Every change of phraseology does not indicate a change of substance and intent. The change may be made to express more clearly the same intent or merely to improve the diction. The change is often found to be the result of carelessness or slovenliness of the draftsman. The changes of phraseology may result from the act being the production of many minds, and from being compiled from different sources. Hence the presumption of a change of intention from a change of language is of no great weight, and must mainly depend on the intrinsic difference as resulting from the modification. A mere change in the words of a revision will not be deemed a change in the law unless it appears that such was the intention. The intent to change the law must be evident and certain. There must be such substantial change as to import such intention, or it must otherwise be manifest from other guides of interpretation, or the difference of phraseology will not be deemed expressive of a different intention. Revisions naturally involve some modifications of expression to bring the laws into system and uniformity." The same author states a rule of construction, which we deem to be applicable to this case (at section 215), as follows: "It is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together, and not each by itself. By such a reading and consideration of a statute its object or general intent is sought for, and the consistent auxiliary effect of each individual part. Flexible language, which may be used in a restricted or extensive sense, will be construed to make it consistent with the purpose of the act, and the intended modes of its operation as indicated by such general intent, survey and comparison. 'Ex antecedentibus et consequentibus fit optima interpretatio.' The order in which provisions occur in a statute is immaterial, where the meaning is plain and there is not a total conflict. A later clause or provision may qualify an earlier one, and the converse is equally true." It follows from an application of the principles of construction above quoted to the provisions of the statute under consideration that the construction contended for by counsel for defendant cannot be sustained.

At the outset it will be noted as a fact of considerable significance that section 1181 and subdivision 10 of section 1182, previously quoted, were not expressly modified, and, as we have seen, said sections, when adopted in this state, had been construed by the supreme court of Minnesota as fixing April 1st as a point of time for determining the taxability of personal property as well as its ownership and value. The defendant relies upon the provision added to section 1189, that "all personal property wherever and

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whenever found between the first day of April and the first day of June shall be listed by the assessor," to sustain his contention. It might appear from a mere casual reading of this provision that it not only supports the defendant's contention, but that it is in conflict and is inconsistent with the earlier sections, 1181 and 1182, which, as we have seen, under a construction settled prior to their adoption in this state, fixed upon April 1st as a point of time for determining the taxability, ownership, and value of personal property for the purposes of taxation. But a more careful examination discloses that there is no real conflict. The provision last quoted, and upon which the defendant relies entirely, must be construed with reference to all other provisions contained in the chapter of which it is a part, which relate to the same subject, and when so construed the provision is not embarrassing, and is not inconsistent with the provisions of sections 1181 and 1182, supra. The last-named sections are general in nature, and, as construed, when adopted require the listing and assessment of all personal property with reference to its existence, ownership, and value on April 1st of each year. Subsequent sections regulate the details of listing and assessment. The persons who are required to list are enumerated. The taxing districts in which personal property is required to be listed are designated with reference to the kind of property, its situs, and the residence of owners. The primary duty of listing property is placed upon the owners thereof. It is the duty of the assessor to procure the lists so prepared, and to place a valuation upon the property so listed, and the duty of the assessor to make out lists of property arises only upon a default on the part of the persons upon whom the duty is primarily imposed. It evidently was not deemed necessary by the legislature, in order to express its intention, and we think it was unnecessary, to repeat in each separate section, and they are very numerous, a provision that the property which the tax payer shall list and the property which the assesssor shall assess is property which is taxable on the 1st day of April. That general declaration was made in sections 1181 and 1182, supra, and it is apparent that when the several subsequent sections refer to the details of listing and assessment of personal property, and the duties of property owners and assessors in reference thereto, reference is made only to property subject to taxation under the provisions of sections 1181 and 1182, which, as already stated, include only personal property in existence and taxable in this state on April 1st. The fact that the process of listing and assessment may extend from April 1st to June 1st has no significance. It was evident to the legislature that it was impracticable to obtain all of the lists of property and complete the assessment in a single day. For this reason the legislature granted a period of two months in which these duties may be performed, and whether performed on the 1st day of April or the last day of May they are of equal effect and validity, for the reason that the details of listing and

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assessment, while accomplished at a later date, relate back to the day when the duty of listing and assessing arose; that is, to April 1st. On this point see *State* v. *Edwards*, 136 Mo. 360, 38 S. W. Rep. 73; *In re Kauffman's Estate*, 104 Iowa, 639, 74 N. W. Rep. 8; *Hayden* v. *Roe*, 66 Wis. 288, 28 N. W. Rep. 186; Cooley, Tax'n, 354, 355; 1 Desty, Tax'n, 194.

Again, it will be noted that there is no provision in the statute which requires the making of additional or supplemental lists to cover property acquired after April 1st. On the contrary, the statute contemplates the making of but one list. It is therefore evident that if all persons who under the law are required to list property within a certain taxing district should on the 1st day of April make out and deliver to the assessor a true and correct list of all personal property then taxable the law would be fully complied with. There is no provision from which it can be inferred that, after such lists have been made and delivered to the assessor, there still remains the further and continuing duty to make out further and additional lists from time to time during a period of two months to cover the various articles of personal property of which persons might, in the course of business or otherwise, become owners. It must be conceded that the legislature has placed no such onerous duty on persons charged with the duty of listing property for the purposes of taxation. This being true, it follows necessarily that when the duty of listing personal property devolves upon the assessor, through a default on the part of those primarily charged with that duty, he is merely required to prepare or procure a list embracing the same property as would have been included had the list been made by the person charged with that duty on April 1st, and he is neither required nor authorized to include or add other or additional property to that which was taxable on the 1st day of April. In this view,—and no other rational construction seems possible,—the command laid upon the assessor in section 1189 to list all personal property, wherever and whenever found, between the 1st day of April and the 1st day of June, must be held to be merely a requirement that, while performing his duties during the assessing period, he shall list, not all personal property which may have an existence in his taxing district during that period, but all personal property in such district which is subject to taxation for the current year, and which it was the duty of the owners to list on the 1st day of April. This interpretation is in harmony with the general provisions contained in sections 1181 and 1182, as construed by the supreme court of Minnesota, and also with all other portions of the act. It is also in harmony with the legislative policy during territorial times as expressed in the Compiled Laws, and also with the policy of this state as plainly declared in the Revised Codes of 1895. We think, too, that it is a fact of some importance on the question of legislative intent that the legislature in the same chapter, in making provision for the taxation of shares of bank stock, pro-

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vided that they "shall be listed and assessed annually with regard to the ownership and value thereof on the first day of April of each year." Section 26, c. 126, Laws 1897. Also that a subsequent legislature, in chapter 5, Laws 1899, in making provision for the taxation of grain in the possession of elevators, warehousemen, etc., required such grain to be assessed to the person, company, or corporation in whose possession it was found on April 1st of each year.

It is not claimed by counsel for defendant that the proviso added to section 1211 grants any power to assess property coming into this state after April 1st. It is argued, however, that it tends to sustain defendant's construction of section 1189. We are unable to see wherein the proviso referred to lends aid to counsel's contention or conflicts in any particular with the conclusions we have reached. It is conceded that the requirement that personal property shall be assessed "at its then value" relates back to April 1st, and does not relate to the time when it is actually inspected by the assessor. So, also, we think the intent and meaning of the provision that personal property shall be assessed "regardless of any change of ownership prior to such assessment" is not obscure, when considered in connection with the further provision of the section that the owner, factor, or agent who is called upon by the assessor to list property in his possession or under his control during the assessing period can relieve himself from the assessment of property found in his possession by showing that it has been assessed elsewhere in the state for that year. The plain purpose of this provision is to relieve the assessor from the burden of ascertaining the ownership of the property on April 1st, which is the period of time which determines its taxability, and casts such burden upon the person in whose possession it is found; and, in case the person in possession fails to show that the property has been assessed elsewhere and to the owner of the same on April 1st, the assessor is authorized to presume that the person then in possession was the owner of the same on April 1st, and to make the assessment accordingly.

For the reasons stated we have reached the conclusion, without hesitation, that under the general revenue laws of this state the taxability of personal property depends upon its existence and presence in the state on the 1st day of April of each year. This we believe has been the construction placed upon our revenue laws both by the public and by the officers charged with their execution. Were the question a doubtful one,—and we do not think it is,—this fact alone would probably control our decision, under the wholesome rule that "the practical construction given to a doubtful statute by the public officers of the state and acted on by the people thereof, is to be considered. It is perhaps decisive in case of doubt." Suth. St. Const. § 309, and cases cited at note 4. We may also add that, if the language employed by the legislature made the question fairly debatable, it would, we think, be our duty to hesitate long before holding that it was the purpose of the legislature to

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establish a two-months' period for determining the taxability of personal property, and thus introduce into this state a system involving great injustice to taxpayers and confusion in tax proceedings,—a system which is not possible of being made effective, and which has been universally condemned by the courts. As already stated, however, we find no warrant in the statutes for holding that the legislature had in view any such intention.

It follows that the trial court erred in sustaining the demurrer to the complaint. Judgment reversed. All concur.

(90 N. W. Rep. 799.)

LILLIAN ADAIR *vs.* AMANDA M. ADAIR.

Wills—Construction—Specific Legacy.

A testator executed a will, and afterwards a codicil thereto. In the codicil the following clause was used: "Should I alone die on this trip, or in consequence of it, then of the one thousand dollars before willed to my wife, five hundred dollars of this money are to be deducted from her, and given to my daughter Lillie or Lillian, before mentioned." The testator had not willed the specific sum of $1,000 to his wife, but had willed to her and another daughter than Lillian the residue of his estate, in value more than $2,000. *Held*, that the legacy was not a specific one.

Intention of Testator Carried Out.

The intention of a testator is to be ascertained from the language of the will and codicil construed together. If the intention expressed in these instruments is clear, transposition of words will not be resorted to.

Appeal from District Court, Ransom County; *Lauder*, J.

Action by Lillian Adair against Amanda M. Adair and others. Judgment for plaintiff, and defendants appeal. Affirmed.

P. H. Rourke and *Alfred M. Kvello*, for appellant.

The will and codicil should be construed together as one and the same instrument. The intention of the testator is to be ascertained from the words of the will. It is apparent that the testator intended taking $500.00 of the money willed his daughter and giving it to his wife. The transposition of the names in the codicil of the will will make the latter harmonize with the facts and express the evident intention of the testator, and this the court may do, if necessary to make the will express the intention of the maker. *Mosley* v. *Massey*, 8 East, 149; *Doe* v. *Allcock*, 1 B. and Ald. 137; Pom. Eq. Jur. 346. The language: "Of the $1,000 before willed to my wife, $500 of this money are to be deducted from her and given to my daughter Lillian" creates a specific bequest. Money may be the subject of a specific legacy. *Walton* v. *Walton*, 11 Am.

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Dec. 468, and note; Page on Wills, 913; *Pendergast* v. *Walsh*, 42 Atl. 1049; *Towles* v. *Swansee*, 106 Mass. 100; *Crawford* v. *McCarthy*, 159 N. Y. 514; *Wheeler* v. *Woodward*, 104 Mich. 418; 18 Enc. L. 717; *Boston Safe & Deposit Co.* v. *Plummer*, 142 Mass. 257. This is not a demonstrative legacy because it is not charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund or evince an intention to relieve the general estate from liability in case the fund fails. 18 Enc. L. 721. *Merriman* v. *Merriman*, 83 N. W. Rep. 162.

Ball, Watson & Maclay, for respondent.

The fact that the testator designates a particular fund from which the legacy is to be taken and paid does not in any way affect the express intent to make the bequest. The language is unambiguous, leaving no room for construction. § 3691 Rev. Codes. The legacy is either demonstrative or general. If demonstrative, the fact that the particular fund out of which it is directed to be paid failed does not affect the gift. *Ives* v. *Canby*, 48 Fed. 718. *Frank* v. *Frank*, 33 N. W. Rep. 153; *Gallagher* v. *Gallagher*, 6 Watts. 473; *Johnson* v. *Goss*, 128 Mass. 433; *Langstroth* v. *Golden*, 3 Atl. 151; *Lake* v. *Copeland*, 17 S. W. Rep. 786; *Burne* v. *Hume*, 49 N. W. Rep. 576; *Johnson* v. *Conover*, 35 Atl. 291; § 3719 Rev. Codes. The language of the codicil being clear, it is inadmissible to attempt to vary its meaning by parol evidence or by conjecture. § 3691 Rev. Codes. The law favors such a construction of the will as will not tend to disinherit heirs. *Scott* v. *Guernsey*, 48 N. Y. 406.

MORGAN, J. This proceeding was instituted by one Lillian Adair, as petitioner, in the county court of Ransom county. In a petition she prays said court to order the executors of the last will and testament of her father, James Adair, to pay to her the sum of $500 bequeathed to her in a codicil to said will. The petition states the following facts: That the testator, James Adair, died on the 19th day of April, 1897, in Presque Isle, in the state of Maine, and was at the time of his said death a resident of Ransom county, N. D. That Amanda M. Adair is her mother, and was the first wife of said decedent, and that John Adair and James Adair are her brothers, and the sons of said decedent and Amanda M. Adair. That Laurastina B. Adair is the second wife of said James Adair, deceased, and that Birdie May Adair is the daughter of said deceased and Laurastina B. Adair. That Charles E. Pierson and Gilbert La Du are the executors of the last will and testament of said James Adair, deceased. That said last will and testament of said James Adair and the codicil thereto was duly admitted to probate in the county court of said county on June 21, 1897. That the codicil to said will was in part in the following words, to wit: "In the name of God, Amen. This codicil, made this ninth day of January, in the year of our Lord one thousand eight hundred and ninety-seven, witnesseth: That I, James Adair, being of

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sound mind and body, but being about to start by next train for Ireland, and considering the uncertainity of life in such a case, do hereby order, devise, and bequeath that, should I, my wife Laura, or Laurastina Birdie, and my daughter Birdie May, all die on or in consequence of this trip, then all my estate, real and personal, after deducting lawful expenses for probating and fees of executors, as may be needed till division of my estate shall be made, shall be divided equally among my surviving children, James Adair, Lillie or Lillian Adair, and John Adair, irrespective of past behavior of any one of them towards me. Secondly. Should I alone die on this trip, or in consequence of it, then of the one thousand dollars before willed to my wife, five hundred dollars of this money are to be deducted from her and given to my daughter Lillie or Lillian, before mentioned. I do not know whether she is married or not, but a letter of hers in my private drawer of dressing case at my residence will explain why I have not had intercourse with her in any way, though I have tried repeatedly to find her. Third. Should wife and I die on this trip, or in consequence of it, then I devise and bequeath to my son James Adair the Burns property in Harris' First addition to the city of Lisbon, in addition to what has already been willed him in the body of the will. To my son John Adair I devise and bequeath the Burns farm, south of Lisbon. To my daughter Lillian I devise and bequeath the homestead on Main street, three lots and building, lots 10, 11, and 12 in Colton's Third addition to the city of Lisbon, as laid down in plat of said city." That said James Adair did thereafter take said trip to Ireland, and died while on his return to his home from Ireland. That sufficient moneys are in the hands of said executors with which to pay said legacy after payment of all debts against the estate of said James Adair. The executors named, Laurastina Adair, and Birdie May Adair, by her guardian ad litem, all appeared and answered, setting forth the last will and testament of said James Adair as follows, omitting formal parts: "(1) I give and bequeath to my beloved daughter Lillie the sum of one thousand dollars out of the proceeds of my policy No. 50,170 in Massachusetts Benefit Life Association. But if my daughter Lillie or her rightful heirs do not appear and claim the same within 10 years from the date of my death, then and in that case said above mentioned $1,000 is to be paid to my daughter Birdie May, if she is then of age, and, if not, then she is to receive the same as soon as she attains her majority. (2) The balance of the proceeds of said above-described policy No. 50,170 I give and bequeath to my beloved sons James and John, share and share alike, but, should either die previous to my own decease, his portion to go to the survivor. (3) I give and bequeath to my beloved daughter Birdie May the proceeds of endowment certificate No. 63,873 of the Su-

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preme Court of Independent Order of Foresters, the same to be paid to her when she attains the age of eighteen years; and I hereby request that my hereinafter mentioned executor Charles Wright invest the proceeds of the hereinbefore mentioned policy and certificate of insurance in Canadian county debentures or in some other Canadian securities. (4) I give and bequeath to Thomas Patterson, M. D., of Cogswell, North Dakota, all my books and instruments appertaining to the practice of my profession. (5) I hereby give, devise, and bequeath to my beloved wife, Laurastina Birdie, but whose name was written in our marriage certificate 'Laura B.,' and to my beloved daughter by my present wife, Birdie May, all the residue of my estate, real, personal, and mixed, of every name, nature, and description, share and share alike. (6) Should either my above-mentioned wife or my daughter Birdie May die previous to my own decease, the survivor is to receive the share of the other." (7) The testator here nominated an executor under the will so far as it bequeathed property not situated in the United States. (8) Nomination of resident executors. (9) Revocation of all former wills. The will and the codicil were duly admitted to probate, and executors were duly appointed to carry out its provisions. There are no unpaid debts at present existing against said decedent's estate. The estate amounts to about $600 in personal property and certain real estate amounting in value to about $1,800. The facts were stipulated in open court at the hearing, and are as above recited. The county court made an order directing the executors to pay the petitioner, Lillian Adair, the $500 bequeathed by the testator in the codicil to the will. The defendants appealed to the district court, and such appeal resulted in an affirmance of the order of the county court. The defendants appeal to this court, and request a trial de novo of all the issues raised by the answer to the petition.

The defendants contend that the petition should not have been granted for two reasons, viz.: (1) That it was not the intention of the testator, as gathered from the will and codicil, construed together, to bequeath said $500 to his daughter Lillian, but that it was the intention of said testator to bequeath $500 to his wife out of the policy bequeathed to his daughter in the will. (2) That the legacy of the $500 is a specific legacy, and the fund out of which it was to be paid having failed, such legacy cannot be paid out of the general property or assets of the estate. On reading the will and the codicil, it will be observed that the testator never bequeathed to his wife any legacy of $1,000, or any other specific sum. The wife and daughter Birdie May were joint residuary legatees of all the property left by the testator after certain other specific bequests had been made. The appellants contend that the decedent never intended to bequeath $500 to his daughter Lillian in addition to the bequest of the $1,000 to be paid out of the policy in the Massachusetts Benefit Life Association. To determine what

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his intention was as to this matter, the will and codicil must alone be considered, and must be construed together, and extraneous facts not shown by these two instruments be disregarded. These two instruments must speak for themselves in ascertaining his intention. It is his will and testament, and the court cannot change it. The clause of the codicil concerning which there is a dispute as to the testator's intention is the following: "Should I alone die on this trip, or in consequence of it, then of the one thousand dollars before willed to my wife five hundred dollars of this money are to be deducted from her and given to my daughter Lillie or Lillian Adair, before mentioned." It is claimed that the testator made two mistakes in this sentence, viz.: (1) He had never willed a specific $1,000 to his wife. (2) That he did not intend to give the daughter an additional sum of money and deprive the wife of it; that he intended to give the wife an additional sum to be deducted out of the $1,000 given to the daughter out of the insurance money. He was mistaken, so far as the record shows, as to having previously willed a specific $1,000 to his wife. But whether he was actually mistaken we do not know, and conjecture cannot be indulged in. We must be governed by the language used, and such language is clear, explicit, and unambiguous, and leaves no room for construction. From the language used in the clause quoted construed in connection with other portions of the codicil and in connection with the will, we are clear that his intention was to give the daughter an additional sum in case he died while on the trip to Ireland, and to construe the clause in a different way would be a misconstruction of the language used equivalent to a total disregard of the words used and the meaning plainly and clearly expressed. But it is claimed that transposition of words should be resorted to by substituting the word "Lillian" in place of the word "wife," and the word "wife" in place of the name "Lillian." If done, the clause would read as follows: "Should I alone die on this trip, or in consequence of it, then the $1,000 before willed to my daughter Lillian, $500 of this money to be deducted from her, and given to my wife, before mentioned." That such was the testator's intention is clearly refuted by the language following this clause, and, before the meaning contended for would be given to this clause of the codicil, further substitution of words for those used would have to be made. We do not think that this would be justified, as it would be changing the expressed meaning before it clearly appears that there has been a mistake in this respect. A reading of the whole clause together renders it very manifest that the additional bequest could not have been intended for the wife. The words following the language of the bequest render it certain that there was no mistake in expressing his intention in the first part of this clause. Transposition is sometimes allowable in construing wills, but, before this can be done, it must clearly appear from the will or codicil, or both, that a mistake was

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made; and it must likewise clearly appear what correction is needed to give effect to the meaning of the testator. Transposition is allowed in some cases when the will is meaningless without transposition and rendered clear with it. 2 Pom. Eq. Jur. p. 346, note; *Latham* v. *Latham,* 30 Iowa, 294. The language used in this case is clear, and we cannot say that the intention as expressed was expressed through mistake entitled to be corrected by substitution of transposition of words.

The only remaining question to be determined is whether the legacy of the $500 is a specific, demonstrative, or general legacy. Section 3719, Rev. Codes 1899, designates legacies, according to their nature, into five classes,—specific, demonstrative, annuities, residuary, and general. These are defined by said section as follows: A legacy of a particular thing specified and distinguished from all others of the same kind belonging to the testator is specific. If such legacy fail, resort cannot be had to the other property of the testator. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid. If such fund or property fail in whole or in part, resort may be had to the general assets, as in case of a general legacy. After defining an annuity and a residuary legacy, this section defines all other legacies as general legacies. The definitions of these several legacies as given in the Code differ in no respect from the common-law definitions thereof. The appellants contend that this legacy is a specific one. The petitioner or respondent contends that it is either a demonstrative or a general legacy. For the purposes of this appeal we need only determine whether it comes within the definition of a specific legacy. Whether it be a demonstrative or a general legacy is immaterial, so far as a decision of this case is concerned. If it is not a specific legacy, the judgment must be affirmed whether it be general or demonstrative. A specific legacy is a bequest of a particular or specified article of personal property distinguished from all other articles of personal property belonging to the testator. A bequest of a coin particularly marked, or of a money deposit in a particular bank, or of specified shares of bank or other corporation stock, or of a particular debt due from a particular person, or of a particular mortgage described, are instances of a specific legacy. *Wheeler* v. *Wood,* 104 Mich. 414, 62 N. W. Rep. 577; *In re Apple's Estate,* 66 Cal. 432, 6 Pac. Rep. 7; 2 Bouv. Law Dict. p. 161. There is no doubt that a bequest of a certain number of dollars is a general bequest. In this case the particular fund out of which it is claimed this $500 bequest was to be paid is the $1,000 willed to the wife as set forth in the codicil. As said before, no such specific sum had ever been willed to the wife, so far as shown. The language used in the codicil in reference to this $1,000 does not specify that such sum was to be paid out of any particular fund, nor is such $1,000 in any way distinguished as having been willed as part of specific money or the proceeds of

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specific property. We have nothing to aid us in determining whether such bequest was specific, general, or demonstrative, except the language of the codicil; and such language seems to indicate that it was a general legacy of that amount. The wife was a residuary legatee under the will. A legacy bequeathed out of the residuary estate is not a specific legacy. It does not particularly specify or distinguish the property bequeathed except as to amounts, and such sum is to be taken out of the proceeds of the residue of the estate after payment of debts and expenses of administration and of the other legacies. The terms of this legacy do not bring it within the definition of a specific legacy. It is not an unconditional bequest of any particular property specified and distinguished from all other property of the same kind belonging to the testator. It is a bequest of a specific sum of money, but the mode of payment is designated. It is to be paid out of a particular fund. That would constitute it a demonstrative legacy, and, the fund having failed out of which it is to be paid, it must be paid out of the general assets. If it be contended that it is a legacy of a specific sum payable out of the residuary estate after administration, that would not constitute it a specific, but a general, legacy. *Parker's Ex'rs* v. *Moore*, 25 N. J. Eq. 228. On the theory that the value of the property bequeathed to his wife in the will amounted to $1,000, the legacy of the $500 to the daughter, as given in the codicil, would be simply a modification of the terms of the will, and this would constitute this legacy a general one. Under no construction of the codicil and will can this legacy be construed as a specific one.

The judgment of the district court is affirmed. All concur.

(90 N. W. Rep. 804.)

GEORGE MAHON *vs.* W. F. LEECH.

Land Contract Extinguished by Parole.

The mutual rights and obligations of the parties to a written contract for the purchase and sale of real estate may be waived and the contract annulled and extinguished by parol.

Specific Performance Denied.

A court of equity will not extend the extraordinary relief afforded by specific performance to a purchaser of real estate who has been grossly negligent of his rights or has abandoned his contract, where the vendor, induced by his action, has entered into obligations inconsistent with the performance of the contract, or where the application for relief is plainly induced by an increase in value of the premises accruing subsequent to a voluntary abandonment of the contract.

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Laches in Asserting Claim.

Upon a retrial in this court of an action for the speicfic performance of three certain contracts for the purchase and sale of farm lands upon what is known as the "crop-payment plan," in which the evidence establishes that the rights of the purchasers under said contracts were voluntarily and unconditionally relinquished and abandoned; that the possession of the premises was surrendered; that the vendor, in reliance upon such relinquishment and abandonment and surrender of possession, entered into possession, and thereafter transferred the title; that the same was thereafter occupied and cultivated by the vendor and his successors for a period of more than three years prior to the commencement of the action, all with the knowledge of, and without objection from, the other parties to the contracts; and that the controlling motive inducing the institution of the action was an increase in the value of the property accruing subsequent to its abandonment,—it is *held* that the trial court properly refused to decree a specific performance of the contracts.

Appeal from District Court, Cass County; *Pollock*, J.

Action by George Mahon, trustee, against W. F. Leech and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Morrill & Engerud, for appellant.

Each land contract was a written contract which cannot be altered except by another written contract or by an executed oral agreement. §3936, Rev. Codes. *Foster* v. *Furlong*, 8 N. D. 282.

The contracts secured the payment of the purchase price by reserving title of the land in the vendors. The equitable title to the land was in the vendees and the vendor retained the legal right as security only for the purchase price. *Nearing* v. *Coop*, 6 N. D. 345; *Moen* v. *Lillesal*, 5 N. D. 327; Jones on Mtges. § § 226 and 1449; Pom. Eq. Jur. 105, 368, 1046, 1161, 1260 and 1261; *Bartz* v. *Paff*, 95 Wis. 848. The vendees had an estate in the land which could be sold. A mortgage of this interest could not be made except by writing. § 4699, Rev. Codes; *Wells* v. *Harber*, 56 Cal. 342; *Stoddard* v. *Hart*, 25 N. Y. 556. The trial court disregarded the judgment in the case of *Leech* v. *Clemenson*. This action commenced by Leech, the owner of the land, against the original vendees in these contracts of sale, sought to quiet title of plaintiffs. The defendants answered alleging an interest in the land by reason of these contracts of sale. Leech replied, admitting the contracts but claimed they were forfeited. The trial of the action was dismissed without prejudice. It was, therefore, competent to show by parol what was the exact question litigated and determined in that case. *Russell* v. *Place*, 94 U. S. 606; *Young* v. *Black*, 7 Cranch 565; *Steam Packet Co.* v. *Sickles*, 24 How 333; Herman on Estoppel, § § 211, 213, 216. Judgment was entered and no appeal was taken. The judgment was a conclusive adjudication that the contracts were still in force and had not been forfeited, cancelled or voluntarily surrendered, and was an absolute bar against the present claim. *Morrill* v. *Morrill*, 11

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L. R. A. 155, and notes. *Howard* v. *Huron,* 5 S. D. 539; *Eakin* v. *McCraith,* 3 Pac. Rep. 838; *Cushing* v. *Edwards,* 25 N. W. Rep. 940; Herman on Estoppel, § § 107, 108 and 110; *Thompson* v. *Roberts,* 24 How. 233. A judgment concludes not only as to matters actually litigated but as to matters which could and ought to have been litigated. *Enderlin State Bank* v. *Jennings,* 4 N. D. 228; 1 Herman on Estoppel, § § 51, 74, 90, 91, 99, 102, 111, 119, 121, 127. The vendee in the contract had a right to cease farming and to pay the balance of the purchase price. Ceasing to farm would give rise to a cause of action to foreclose the contracts, and nothing more. *Nearing* v. *Coop,* 6 N. D. 345; Pom. Eq. Jur. § § 1190, 1193 and 1219. The provision for absolute forfeiture by reason of any default in the contracts was void. § 4684, Rev. Codes; *Holridge* v. *Gillespie,* 2 John. Ch. 30; *Clark* v. *Henry,* 2 Cow. 324; *Niggler* v. *Maurin,* 24 N. W. Rep. 369; *Peugh* v. *David,* 96 U. S. 332; Pom. Eq. Jur. § § 963, 1193 and notes. There was no writing relinquishing or transferring to Leech the trust estate's equity in the lands. This equity was an estate in the land. § 3300, Rev. Codes; *Nearing* v. *Cooper,* 6 N. D. Rep. 345; *Moen* v. *Lillestad,* 5 N. D. Rep. 327; *Bartz* v. *Paff,* 69 N. W. Rep. 297; Pom. Eq. Jur. § § 105, 368, 372, 1261, 1406.

Barnett & Reese and *Jno. E. Greene* for respondents.

Any declaration made by the creditor to his debtor as a release of it and which the debtor acts upon to the material alteration of his position will operate as a release. 1 Beach Mod. L. Contr. 464; *Canal Co.* v. *Ray,* 101 U. S. 522; *Herzog* v. *Sawyer,* 61 Md. 344; *Fleming* v. *Gilbert,* 3 Johns. 528. A dismissal without prejudice would neither estop the plaintiff with regard to the introduction of testimony nor bar his right of action for the relief sought or any other relief affecting the property in question. *Gunn* v. *Peakes,* 36 Minn. 177; *Wanzer* v. *Self,* 30 O. St. 378; *Krutsinger* v. *Brown,* 72 Ind. 466; *N. P. Ry. Co.* v. *Ry. Co.,* 47 Fed. Rep. 536.

YOUNG, J. The plaintiff, in his capacity of trustee, and for the benefit of certain creditors of one G. A. Grover, an insolvent, seeks the specific performance of three certain contracts for the conveyance of real estate, which contracts constituted a part of the assets of the trust estate of said insolvent. The trial court found that all of the rights of Grover and all other persons in the contracts in question were wholly released and surrendered by a former trustee. Judgment was accordingly entered dismissing the action. Plaintiff has appealed from the judgment, and in a settled statement of case, containing all the evidence offered in the trial court, demands a review of the entire case in this court, under section 5630, Rev. Codes.

The facts which are material to a determination of this case may be stated as follows: On April 20, 1891, Addison Leech, Sr., now deceased, was the owner of four quarter sections of land sit-

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uated in Cass county. On said date he entered into a written contract with one Peter Anderson for the sale of one of said quarter sections upon what is known as the "crop-payment plan." On June 15, 1891, he made a similar contract with Gilbert and Christian Clemenson for the sale of two quarter sections. And on March 21, 1892, he sold the remaining quarter section to Claus M. Olson. The aggregate purchase price of the four quarter sections was $16,489. The three contracts are identical, except as to dates, names of parties, description of property, and amount of purchase price. In each contract the purchaser agreed that he would pay all taxes assessed against the premises before they became delinquent, that during the life of the contract he would properly seed as much of the land as could profitably be sown, and that he would sow a specified number of acres of wheat each year. The purchase price, with annual interest thereon at the rate of 7 per cent., was to be paid by delivering one-half of the crop free of expense to the vendor within a reasonable time after threshing, which was to be completed by October 15th in each year. In consideration of the full and prompt performance of the covenants so made by the purchasers, the vendor agreed, upon a full and complete performance, to execute and deliver warranty deeds to the premises so agreed to be conveyed. The purchasers above named entered into possession under said contracts, and it is admitted that during the period of their occupancy, which extended to the fall of 1893, and included the delivery of the crop for that year, they fully complied with their covenants and agreements in said contracts contained. In the fall of 1893 all of said purchasers, by instruments in writing, assigned their interests in said contracts to one G. A. Grover, a merchant then doing business in Horace, in said county, which assignments were assented to by Addison Leech, Sr., by written indorsements upon the contracts. At the date of such assignments the total sum remaining unpaid on the three contracts was $12,388.55. There was also due at that time to Addison Leech, Sr., from the several purchasers, an aggregate additional sum of $3,486.58 for personal property which he had sold to them, which latter sum was evidenced by the separate notes of the purchasers, secured by their chattel mortgages. In consideration of the consent of Addison Leech, Sr., to his (Grover's) substitution to the rights of the original purchasers under the land contracts, he (Grover) assumed in writing the performance not only of the conditions of the contracts so assigned, but also the payment of the entire indebtedness of the original purchasers, which included both the land and personal property indebtedness above mentioned, amounting in all to the sum of $15,875.13. Thereafter Addison Leech, Sr., had nothing to do with the personal property covered by the chattel mortgages, and the same was apparently released to Grover and the mortgagors pursuant to an agreement made by the former at the time of his purchase of the interests of the latter in the land contracts.

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By virtue of the assignments of the contracts, and his substitution thereunder, Grover took possession of the premises and farmed the same during the farming season of 1894, and in all things complied with the conditions of the contracts. In the fall of 1894 Grover became insolvent, and on December 19th of that year he entered into a written contract with one Albert E. Jones and a large number of his creditors whereby the said Jones was appointed trustee. In pursuance of such written contract, Grover transferred all of his property, both personal and real, including the contracts here in question, to said Jones, for the use and benefit of the creditors who had joined in said contract. Jones continued as trustee under said contract until about the 1st of May, 1900, when he was removed by an order of the district court of Cass county, and the plaintiff herein was appointed in his place. It appears that Jones took possession of the premises under his trusteeship, and operated the same during the farming seasons of 1895 and 1896 without default, and up to and including the delivery of the one-half of the crop for the year 1896. Jones did no plowing in the fall of 1896. On the contrary, he entirely abandoned the premises, and neither he, nor any person representing either Grover or the creditors, has been in the possession of the land since the division of the crop of 1896, or made any attempt or offer to comply with the obligations imposed by the contracts here in question. After applying all payments made by Grover from the proceeds of the crop grown in 1894, and by Jones from the proceeds of the crops grown in 1895 and 1896, there remained unpaid, when Jones relinquished possession in the fall of 1896, upon the gross indebtedness of $15,875.13, which Grover had assumed, the sum of $13,346.63. There is no dispute as to the amounts paid by Grover and Jones, but a dispute exists as to the manner of application. Plaintiff contends that all the payments from the crops grown should be credited on the land contracts, and that no part of the same should be applied on that portion of the debt which originally constituted the personal property indebtedness. If the payments made were so applied, then there was due upon the land contracts when Jones relinquished possession the sum of $9,853.66, and upon the personal property indebtedness the sum of $3,492.97. After the abandonment by Jones in the fall of 1896, the vendor, Addison Leech, Sr., took possession of the premises, and continued in possession until December 1, 1898, when he conveyed the title to his two sons, W. F. Leech and Addison Leech, Jr., the defendants herein, who have since possessed and farmed said premises. In June, 1900, the plaintiff instituted this action, in which, after alleging the facts which constitute his cause of action, he prays that the contracts in question be adjudged in full force and effect; that the defendants be required to surrender possession of the lands, and to account for the rents and profits and value of the use during their occupancy; that the amount due on the contracts be deter-

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mined, and the rents and profits be applied thereon; that the plaintiff be permitted to sell the lands, subject to the contracts, for the benefit of the trust estate; and for such further relief as may seem just and equitable in the premises.

The question as to whether the gross indebtedness assumed by Grover when he obtained the assignments of the contracts constituted a new consideration, which he was legally obligated to pay, as a condition precedent to his right to secure deeds from the vendor, as defendants contend, or whether he was legally entitled to a conveyance of title upon paying merely the amount which the original purchasers had contracted to pay for the land alone, and not including the personal property indebtedness, is discussed at much length by counsel for both parties. This question would be an important one if we were of opinion that the facts as we find them entitled the plaintiff to the relief which he seeks. But inasmuch as we have reached the conclusion, for reasons hereinafter stated, that plaintiff must necessarily fail in his action, it is not material to a determination of this case whether the payments should have been applied as plaintiff contends, or in accordance with the views of the defendants.

The trial court found that all of the rights of G. A. Grover and all other persons in the premises under the contracts in question were voluntarily and unconditionally surrendered to the vendor, Addison Leech, Sr., on or about the 1st day of June, 1897. This finding is fully sustained. It appears from the evidence contained in the record presented to this court that in the fall of 1896, Jones had disposed of or exhausted all of the assets of the estate except the contracts here in question, and was therefore without funds or ability to proceed further with such contracts. He informed Leech of this fact and also advised the creditors of the exact situation. At his request a meeting of the creditors was called for the purpose of determining what should be done in reference to these contracts. At such meeting twenty-nine or thirty of the thirty-three creditors who were parties to the trust agreement were present in person or by representatives. Jones, the trustee, was also present. After a full consideration of the condition of the land, which was then unplowed, and its probable value, it was determined without dissent that their interest under the contracts was of little or no value, and the creditors emphatically declined to advance funds to carry out the contracts, and directed Jones to proceed no further thereunder. One of the creditors suggested at the conference that they could probably get five or six hundred dollars from the vendor for turning the land back. W. F. Leech, who was present as the agent and representative of his father, replied that they would rather give the creditors that sum, and have them go on and comply with the contracts. This, as already stated, the creditors declined and refused to do. Jones testified that he told Leech that he could not and would not

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proceed with the contracts, and that this was the decision of the creditors. A number of the creditors who were present at the conference testify to the same effect, and the facts as narrated are not disputed. It is entirely clear that the vendor, Leech, was not only willing, but anxious, that the trustee should proceed and carry out the contracts. The attitude of the trustee and creditors, on the other hand, was the exact reverse. They not only failed to carry out the conditions of the contracts, but absolutely declined and refused to perform the same. Pending the negotiations between Leech and Jones and the creditors, the trustee failed and neglected to do any fall plowing in the fall of 1896, or take any steps toward producing a crop for the year 1897. Finally, and on or about the 1st day of June, 1897, Addison Leech, Sr., evidently as a last resort, accepted the surrender and abandonment so made by the trustee and creditors, and with the full knowledge and consent of Jones and the creditors, and without objection on the part of any one, and in reliance upon and induced by such abandonment and surrender, entered into possession and summer-fallowed the land in 1897, and cropped the same in the year 1898, and in December of that year transferred the same to these defendants, who have since occupied and farmed the same with the knowledge of Grover, Jones, and the creditors, and without objection on the part of any one. From the date of the abandonment by Jones, in fall of 1896, up to the comencement of this action, in June, 1900, no offer of performance or attempt to perform has been made by any person interested in the trust.

Counsel for plaintiff contend that the defense upon which the defendants rely, viz., abandonment and rescission of the contracts, was determined adversely to them in a former action, and that the judgment in said action, not having been appealed from, is conclusive as to all matters which were or might have been determined therein. This contention is based upon an apparent misconception of the legal effect of the judgment referred to. It appears that in March, 1897, Addison Leech, Sr., instituted an action to quiet title to the premises in question, in which action he made the original purchasers, Jones, Grover, and the creditors defendants. The case was tried in October, 1897. At the close of plaintiff's testimony, on motion of defendants' counsel, the court ordered a dismissal of the action. The judgment of dismissal recites on its face that it is "without prejudice to any other action." The effect of this recital in the judgment is to prevent it from operating as a bar in another suit brought on the same subject-matter. By its very terms it does not constitute a bar. See *Prondzinski* v. *Garbutt,* 10 N. D. 300, 86 N. W. Rep. 969, and cases cited. It is patent that judgment referred to does not preclude the defendants from interposing the defense here relied upon.

Do the facts, as narrated, entitle the plaintiff to a decree of specific performance, or to any relief at the hands of a court of

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equity? We have little hesitation in giving a negative answer to this question. The evidence, in our opinion, establishes a voluntary and unconditional relinquishment by all of the parties to the trust of their rights under the contracts in question, and a voluntary surrender by them of the possession of the premises to the vendor. It also establishes an acceptance of the surrender of possession, and an assumption of the same by the vendor, followed by a subsequent transfer of the title by the vendor, and the creation of entirely new relations with reference to the property in question, all in reliance upon such abandonment. It stands uncontradicted that up to the present time no attempt or offer to perform the conditions of the contracts has been made by any person connected with the trust, other than that contained in the allegation of the plaintiff's complaint herein that "he is ready and willing to perform the terms and conditions of the contract." We think it can be fairly said that at no time since the abandonment by Jones, in the fall of 1896, has there been any intention on the part of any person connected with the trust to comply with the terms of the contracts; and that no such purpose exists at this time we think is also manifest. The acts both of Grover and of the present trustee evince a contrary purpose. For instance, in 1897, after Jones had abandoned the premises, Grover applied to the district court, not to obtain relief from the default made by the trustee, but to secure an order authorizing a sale of the land at auction, subject to the contracts. Such an order was procured, and an attempted sale thereunder proved abortive, for reasons which we need not narrate. In the present action the chief prayer of the plaintiff is that he "may sell said lands subject to the contracts for the benefit of the trust estate." The plainly declared purpose of Grover in 1897, and the evident intent of the plaintiff at this time, is not to excuse the default and to comply with the conditions of the contracts, but is merely to obtain judicial authority and sanction for a sale of rights and equities under the contracts, which, as we have seen, were unconditionally and voluntarily abandoned in 1896. The facts, as narrated, operate as a bar to any such relief in a court of equity.

The fact that the relinquishment was not in writing is not important. That the mutual rights and obligations of the parties to a written contract for the purchase and sale of real estate may be waived, and the contract annulled and extinguished, by parol, is well settled. It is also well settled that where a party has been grossly negligent of his rights, or has abandoned his contract, a court of equity will not extend to him the extraordinary relief afforded by specific performance. The rule as stated in *Huffman* v. *Hummer*, 18 N. J. Eq. 83 is as follows: "Where the complainant has by parol waived or discharged a contract, and the defendant by such action has entered into obligations inconsistent with its performance, it is an equity that will bar the remedy by specific performance." The cases are numerous where this wholesome

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and equitable rule has been recognized and applied. *King* v. *Morford,* 1 N. J. Eq. 274; *Ryno* v. *Darby,* 20 N. J. Eq. 231. In *Dearborn* v. *Cross,* 7 Cow. 48, it was held that a court of law should, and a court of equity undoubtedly would, presume a rescission of a written contract for the sale of land from the fact of a surrender of possession by the vendee, and an accepttance of it by the vendor, and a subsequent sale by the vendor, as against either party who should attempt to enforce the contract. See, also, *Ballard* v. *Walker,* 3 Johns. Cas. 60; *Fleming* v. *Gilbert,* 3 Johns. 528; *Green* v. *Green,* 9 Cow. 46; *Ketchum* v. *Evertson,* 13 Johns. 359, 7 Am. Dec. 384; *Morrill* v. *Colehour,* 82 Ill. 618; *Murray* v. *Harway,* 56 N. Y. 347; *Baldwin* v. *Salter,* 8 Paige, 473 (4 L. Ed. 508); *Raffensberger* v. *Cullison,* 28 Pa. 426; *Boyce* v. *McCulloch,* 3 Watts & S. 429, 39 Am. Dec. 35; *Stevens* v. *Cooper,* 1 Johns. Ch. 425, 1 L. Ed. (1 Johns. Ch.) 196, and cases cited in note; *Stearns* v. *Hall,* 9 Cush. (Mass.) 31; *Cummings* v. *Arnold,* 3 Metc. (Mass.) 486, 37 Am. Dec. 155, and cases cited; *Goss* v. *Nugent,* 5 Barn. & A. 65; *Robinson* v. *Page,* 3 Russ. 114. The foregoing authorities wholly sustain the doctrine that a written contract may be discharged by parol, and that a court of equity will not decree specific performance in cases coming within the rule stated in *Huffman* v. *Hummer,* supra. In *Stoutenburgh* v. *Tompkins,* 9 N. J. Eq. 332, it was held that "one who has been in the enjoyment of property under an agreement, and has surrendered and abandoned it, who has betrayed the confidence existing between the parties, and has by his conduct and dealings with the defendant, and his treatment of the property, beguiled the defendant into the belief that he intended to give up all his rights and interest in the contract, comes into court with a case wholly void of equity, when he demands a specific performance." The following rule, formulated by Mr. Justice Story in *Taylor* v. *Longworth,* 14 Pet. 172, 10 L. Ed. 405, has been received by the courts with universal approval: "If the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has in the intermediate period been a material change of circumstances, affecting the rights, interests, or obligations of the parties, in all such cases courts of equity will refuse to decree specific performance, upon the plain ground that it would be inequitable and unjust." The facts of this case bring it squarely within the rule above stated. We have here a voluntary and unconditional abandonment of the contracts, and a surrender of possession of the premises, and an acceptance of the same by the vendor, followed by a subsequent transfer of title, and the establishment of new relations as to the property which are inconsistent with a performance of the contracts.

Another reason exists for denying the plaintiff the relief which he seeks. There is a well-settled principle that "a plaintiff calling

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for performance after a great lapse of time must satisfy the court that he did not lie by to take advantage of fortuitous circumstances, that during the whole period he had it in contemplation to perform the contract, and that the other party expected to be called upon." *Alley* v. *Deschamps,* 13 Ves. 225; *Tiernan* v. *Roland,* 15 Pa. 429. This the plaintiff has failed to do. On the contrary, it would appear that the institution of this action was prompted by a subsequent and substantial increase in the value of the land. If at this time the plaintiff were relieved from the legal consequences of the abandonment, which occurred in 1896, and the rents and profits accruing subsequent thereto were credited upon the original purchase price, as he prays, concededly there would be an equity amounting to several thousand dollars in value. But such a course would be palpably unjust and inequitable to the defendants. The value of the equities of the vendees under the contracts as they existed at the time of the abandonment was carefully considered by the creditors, who, it must be conceded, were amply able to carry out the contract, if they had so desired; and it was determined without dissent that they were of little or no value, and Jones was directed not to perform the contracts. Time has rendered that valuable which the creditors deemed valueless, and which they voluntarily abandoned. Will a court of equity, because of this fortuitous circumstance, and under the circumstances of this case, wrest the land from the defendants and give it to the plaintiff? Most certainly not. Courts of equity look with small favor upon those who seek their aid in actions prosecuted under a change of mind induced by motives such as are here manifest. *Holgate* v. *Eaton,* 116 U. S. 33, 6 Sup. Ct. 224, 29 L. Ed. 538; *O'Fallon* v. *Kennerly,* 45 Mo. 124.

For the reasons stated, the conclusions of the trial court meet our full approval, and the judgment dismissing the action is accordingly affirmed. All concur.

(90 N. W. Rep. 807.)

JOHN DEACON *vs.* C. L. MATTISON.

Parol Evidence—Breach of Contract.

Where the obligations of a written contract are expressed in unambiguous language, it is not competent to vary or contradict them by parol evidence of custom or usage, and thus create obligations different from those embodied in the contract.

Verdict by Direction.

Evidence examined. *Held,* that the trial court did not err in directing a verdict for the defendant.

Appeal from District Court, Cass County; *Pollock,* J.

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Action by John Deacon against C. L. Mattison. Judgment for defendant, and plaintiff appeals. Affirmed.

Benton, Lovell & Holt, for appellant.

Morrill & Engerud, for respondent.

YOUNG, J. This is an action to recover damages for an alleged breach of a covenant contained in a written contract under which the defendant occupied and cultivated certain farm lands owned by the plaintiff during the farming seasons of 1899 and 1900. The trial court excluded certain testimony offered by the plaintiff, and directed a verdict for the defendant. Plaintiff has appealed from the judgment entered in defendant's favor. The appellant assigns error upon the order directing the verdict and upon the exclusion of evidence.

The contract in question is a partly written and partly printed one. The printed portions embrace the various covenants and conditions found in printed blanks, commonly used in framing contracts for cropping farm lands on shares. Upon its face the contract purports to have been executed on January 19, 1899. The defendant agreed therein to properly farm and cultivate 95 acres of the land therein described during the farming seasons of 1899 and 1900. Among other things the defendant covenanted and agreed, "after taking off the crops, to plow immediately, in a good and proper manner, * * * so much of such parts of said farm suitable for a succeeding crop as shall be plowed at the time the party of the first part takes possession thereof." The covenant just quoted—and it is for the alleged breach of this covenant that this action is brought—is found in the printed portions of the contract, and is one of a large number of covenants contained therein, which are commonly inserted in such blank forms of contracts. The plaintiff alleges that the defendant failed and neglected to plow back the land or any portion of the same in the fall of 1900, prior to his surrender of possession, and thereby committed a breach of the covenant above quoted.

It appears from the following written portions of the contract that it covered 95 acres, and that the land was all unplowed when the contract was executed: "First party [the defendant herein] agrees to break up eighty acres in good season in 1899, and put same into flax; balance, consisting of about fifteen acres of cultivated land now unplowed, shall be put into oats in 1899. * * * First party is to receive $1.50 per acre for the 80 acres he shall break as above. * * * This lease applies only to the eighty acres to be broken, together with the fifteen acres now cultivated." It will be seen that 15 acres is particularly described as being then unplowed, and the remainder was virgin prairie.

The plaintiff, when testifying in his own behalf, was asked this question: "State whether or not Mr. Mattison [the defendant] did any plowing in the fall of 1900?" An objection to this question was sustained, and this ruling is assigned as error. The plaintiff

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then offered to prove that, when defendant surrendered possession of the land in the fall of 1900, he left it unplowed; further, that a custom prevailed in the vicinity of this land that, "where a tenant breaks land in the spring to be cropped that season, if he shall receive pay from the owner of the land for doing such work it is the custom that he shall plow it back in the fall at his own expense." The rejection of this offer is also assigned as error.

We are agreed that the trial court did not err in the rulings complained of. The covenant upon which the plaintiff bases this action did not bind the defendant to plow back all of the land leased by him or any specified number of acres. His obligation was merely to plow back such portions of the land as were plowed when he took possession. It was manifestly necessary, therefore, to create a breach of the covenant, that two facts should exist: First, it must appear that a portion of the land was plowed when the defendant took possession; second, that the defendant left it unplowed in the fall of 1900. The defendant was under obligation to plow back only such portions of the land as were plowed when he took possession. No evidence was introduced or offered showing, or tending to show, that any portion of the land was plowed when he took possession. The only evidence contained in the record on this question is afforded by the contract itself, which was introduced in evidence by the plaintiff, and from which it appears that when it was executed no portion of the land was plowed. In the absence of evidence that any part of the land was plowed when the defendant took it, the evidence offered to show that it was unplowed when he surrendered possession did not tend to establish a breach of the covenant, and was therefore properly excluded.

Neither was it error to reject the offer of proof of custom above referred to. No evidence was introduced or offered to show and it is not alleged that the parties contracted in reference to any such custom. The plaintiff does not sue upon an obligation arising by virtue of a custom, but, on the contrary, bases his cause of action upon the express covenant contained in the written contract. Its language is in no sense ambiguous, and requires no reference to any custom or usage to ascertain the intention of the parties. It is true this particular covenant was not applicable to the conditions which existed in this case, but this fact would not warrant us in extending it by construction so as to create a new and different obligation from that which is expressed in plain language. As already stated, it is one of numerous covenants inserted in such blanks for the benefit of landlords, regardless of the existence of conditions which may render them operative. The covenant sued upon particularly declares the conditions upon which it will become operative. There is no evidence in the case that it did become operative. Where the obligations of a written contract are expressed in unambiguous language, it is not competent to contradict or vary them by parol evidence of custom, and thereby create different obli-

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gations from those entered into by the parties. In commenting on this question in *Simmons* v. *Law*, *42 N. Y. 219, the court said: "A clear, certain, and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated and their liability to be determined." See, also, cases cited in 27 Am. & Eng. Enc. Law, p. 846.

There being no evidence offered or introduced to show that the covenant in question became operative, and that a breach thereof occurred, the trial court properly directed a verdict for the defendant. It follows that the judgment must be affirmed, and it is so ordered. All concur.

(91 N. W. Rep. 35.)

JOHN AMUNDSON *vs.* HARRISON WILSON.

Fraudulent Conveyances—Judgment Creditor.

In actions to set aside conveyances of real estate as fraudulent, as against a creditor claiming under a judgment, proof of such judgment is requisite to maintain such action.

Proof of Judgment.

The fact that such judgment was rendered in an action before the same court and judge is not, of itself, ground for dispensing with such proof.

Manner of Proving Judgment.

If a proper objection is made, such judgment cannot be proven by introducing in evidence the executions issued thereunder, nor by the judgment docket containing an abstract of such judgment, nor by parol, in the absence of a showing that will allow the offer of secondary evidence.

Judicial Notice.

Under section 5713d, Rev. Codes, a trial court is not required to take judicial notice of such judgment without being called upon to do so, and the introduction in evidence of the judgment docket, which is competent for some purposes in the case, is not, of itself, tantamount to calling upon the judge to take judicial notice of such judgment.

Appeal from District Court, Barnes County; *Glaspell*, J.

Action by John Amundson against Harrison Wilson and Ida M. Wilson. Judgment for plaintiff. Defendants appeal. Reversed.

Lockerby & White (*E. H. Wright*, of counsel), for appellants.

Zuger & Paulson, for respondent.

MORGAN, J. This is an action to cancel and set aside a deed to

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real estate made and delivered on the 22nd day of January, 1898, by one Lydia A. Hackett to Ida M. Wilson, one of the defendants, for the N. W. ¼ of section 2, of township 141 N., of range 58 W. The defendant Harrison Wilson had purchased said lands from said Hackett under a contract or bond for a deed, and on January 21, 1898, completed the payment of the purchase price agreed upon for the same, and on the 22d day of January he caused said Hackett to convey said land by deed to his wife, Ida M. Wilson. It is alleged in the complaint that such deed was made and delivered with intent to defraud the plaintiff, and to prevent the collection of a certain judgment recovered by him against said Harrison Wilson; the action in which said judgment was recovered having been commenced on January 21, 1898. The action is also brought for the purpose of setting aside a certain chattel mortgage made and delivered by said Harrison Wilson to his wife, Ida M. Wilson, upon certain personal property, consisting of a threshing machine rig, upon the alleged ground that such mortgage was given with intent and for the purpose of hindering, delaying, and defrauding the plaintiff, a creditor of said defendant Harrison Wilson. The complaint sets forth the recovery of the judgment, the issuing of executions, the conveyance of the land, the giving of the chattel mortgage, the insolvency of the defendant Harrison Wilson, and that such conveyances were without consideration, fraudulent and void, and prays that they be canceled and set aside. Both defendants answered, and denied all the allegations of the complaint, and allege that the conveyances described in the complaint were given for a valuable consideration, in good faith, and without fraudulent intent. The trial resulted in a judgment in favor of the plaintiff, based on findings duly made by the court to the effect that all the allegations of the complaint are true. The defendants have appealed from such judgment, and have demanded a trial anew in this court.

The defendants claim, among other contentions, that there is no competent proof in the record that the plaintiff ever recovered a judgment against the defendant Harrison Wilson, and consequently that there is no proof that the defendant is a creditor of the plaintiff. Neither the entry of the judgment nor the judgment were proven at the trial. Nor was the existence of such judgment or its entry admitted by the defendants. The docketing of such alleged judgment was proven by the introduction in evidence of the judgment docket, and two executions purporting to have been issued upon such judgment were received in evidence. To the introduction of the judgment docket and the executions in evidence defendants objected when they were offered.

As the case is here for a trial de novo, it becomes necessary to determine whether the judgment docket or the executions are properly admissible as evidence of the recovery and entry of the judgment, in the absence of proof of the entry of such judgment in the judgment record. The district court expressly found that it had

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been proven at the trial that a judgment for a specified sum had been recovered against the defendant and in favor of the plaintiff. If such finding is not sustained by competent evidence, neither it nor the judgment appealed from, on which it is based can stand. Section 5412, Rev. Codes, provides that a judgment is the final determination of the rights of the parties in the action. Section 5479 provides that "judgment upon an issue of law or fact, or upon confession, or upon failure to answer may be entered by the clerk upon the order of the court or of the judge thereof." Section 5487 provides that "the clerk shall keep among the records of the court a book for the entry of the judgments to be called the 'Judgment Book.'" Section 5488: "The judgment shall be entered in the judgment book and shall specify clearly the relief granted or other determination of the action." Section 5489 provides for the making up of the judgment roll by the clerk. Section 5490 provides for the docketing of judgments for the payments of money in the office of the clerk in a book known as the "Judgment Docket."

Under these sections this court has held that "there can be no judgment capable of being docketed or enforced in any manner until it is entered in the judgment book." *In re Weber,* 4 N. D. 125, 59 N. W. Rep. 523, 28 L. R. A. 621. In Iowa, under similar statutes, it is held: "It is apparent from the foregoing provisions that it is essential to the validity of a judgment that it should be entered upon the judgment book. This is the book in which a statement of the proceedings of the court is kept, and to which appeals must always be made to determine what has been done. The theory of the law is that it is kept under the direction and supervision of the judge, is approved by him, and constitutes the only proof of his acts." *Case* v. *Plato,* 54 Iowa, 67, 6 N. W. Rep. 128. In *Baxter* v. *Pritchard* (Iowa) 85 N. W. Rep. 633, the supreme court of Iowa said: "The only evidence introduced to show that plaintiff had a judgment was the judgment docket, and to this defendant objected, and his objections were overruled. * * * The record book is the best evidence of a judgment, and it, or a certified transcript thereof, is alone admissible to show a judgment, where no foundation is laid for introducing secondary evidence."

That a judgment docket is not properly admissible in evidence as the best evidence of the rendition and entry of the judgment is not seriously contended by respondent's attorneys. Their contention is expressed as follows in their brief: "The docket was not presented to the court to prove the existence of the judgment, but to invoke the judicial notice of the court. The court could have taken judicial notice of the judgment without the introduction of any book, because he was acquainted with the fact of such judgment and the record thereof." The above contention of the attorneys for respondent is based upon section 5713d, Rev. Codes, which reads as follows: "No evidence of any fact of which the court will take judicial notice need be given by the party alleging its ex-

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istence; but the judge upon being called upon to take judicial notice thereof may, if he is unacquainted with such fact, refer to any person, document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling on him to take such notice produces any such document or book of reference." Courts will take judicial notice of the following facts: "(14) That the case before the court had connection with one formerly decided by it; * * * (19) of its own records and judgments." The language of this section is plain that the judge is to be called upon to take judicial notice of certain facts appearing in its records before he is to take such notice of such facts. The trial judge is not bound by such section to take judicial notice of any fact of his own motion. The party desiring the benefit of not being compelled to offer evidence of such fact must inform the court and opposing counsel that the provisions of the statute are relied on. Then the court elects whether it will take judicial notice of the fact suggested or not. Whether a judgment has been entered or not is a question of fact. In this case the answer denies that such judgment was entered. At no stage of the trial was the court expressly requested to take judicial notice of this judgment. It is not a judgment in the pending action. The issues are not the same as in the action on trial. The parties are not the same. In this case the wife is a necessary and proper party. In the former action she was not a party. It does not appear that the trial court did take judicial notice of the judgment. Proof of such judgment was therefore indispensable. It is claimed by respondent's counsel that the offer of the judgment docket was made as a request that the court take judicial notice of the judgment. No such purpose was stated by counsel when the offer was made. The offer of the docket was competent and relevant for another purpose. The issue of execution in this class of cases was necessary before bringing this action. The issuing of an execution presupposes the existence and docketing of a judgment. Hence the judgment docket and the executions were properly received in evidence for purposes not at all connected with the question of evidence, notice, or the existence of the judgment. Hence the defendants' counsel and the court had the right to suppose that the offer of these records was made for other purposes than that of invoking judicial notice of the entry of the judgment. In appeals from judgments rendered after trial, under section 5630, Rev. Codes, all the evidence on which the trial court based its judgment, as well as all evidence offered, is to be brought before this court. Objections may be noted thereto, but no evidence excluded from the record. Whatever evidence or fact is presented for consideration to that court must be produced in this court for consideration. The judgment not having been rendered in the same action, and the court not having been requested to take notice of its existence, proof thereof was required in order to show that plaintiff was a creditor. If the defendants had any

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valid objections to urge against the existence of such judgment, they had the right to have the judgment exhibited and offered. In *Anderson* v. *Cecil,* 86 Md. 493, 38 Atl. Rep. 1074, the court said: "If, as contended at the argument, the complainants' right to the relief prayed for in the bill rested upon anything contained in these proceedings, they should have exhibited with the bill such evidence of their claim as would satisfy the court of the correctness of their contention. If the facts rest in record or depend upon written evidence, such documentary evidence of their truth as office copies or short copies and docket entries are required. * * * The facts that the proceedings referred to may be in the same court will not relieve the complainants of this obligation. A court will take judicial notice of its own records, but cannot travel for this purpose out of the records relating to a particular case; it cannot take notice of the proceedings in another case." See, also, 2 Whart. Ev. § 326. "The judgment itself may be produced for the inspection of the court when such judgment becomes relevant in another action in the same court. Such a judgment requires no authentication when produced by the clerk, as the court takes judicial notice of its own records." Jones, Ev. § 639. The record does not, therefore, show by any competent evidence that the plaintiff has a valid judgment against the defendants.

It is claimed that the record is replete with evidence that the case was tried on the theory that plaintiff recovered a judgment against the defendants. It is true that plaintiff's attorney, while a witness for the plaintiff, mentioned the fact of the recovery of judgment. He did not give dates, amounts, or any specific information concerning the same. He was not asked any questions, but gave his testimony in narrative form, and defendants' attorneys promptly moved to strike out such testimony. We think that such motion should have been granted, and the evidence disregarded, and this court will not regard such evidence as proof of a judgment, as against objection.

Some claim is also made that the evidence shows that such a judgment was rendered and entered by admissions of counsel and statements of witnesses made during defendants' examination under supplementary proceedings and during the trial of this action. There is no evidence in the record to that effect not objected to. Nowhere is the judgment proven by competent evidence, and it cannot be proven by general reference to the judgment, or "judgment debtor," or similar expressions. "A judgment is proved, not by the execution nor by parol evidence, but by the judgment itself." Jones, Ev. § 199. "If it [the judgment] was rendered in the same court in which the action is brought, the original record or judgment roll should be produced." Black, Judgm. § 968. See, also, 17 Am. & Eng. Enc. L. p. 926, and cases cited in note 6.

The record contains no competent proof that the judgment pleaded was rendered or entered. The executions or judgment docket were

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therefore not shown to be founded on a judgment duly rendered or entered. The plaintiff did not bring himself within the provisions of section 5713d, Rev. Codes, by expressly requesting the court to take judicial notice of the judgment. The judgment appealed from therefore, was not based on any evidence so far as the judgment in the original action is concerned. This failure to offer the judgment was probably an oversight, and the attention of the trial court was not called to such omission until after the findings were made. Under the circumstances shown in the evidence relating to the cause of action on the merits, we deem it proper and in furtherance of justice to remand the case for a new trial, and such will be the order.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

(91 N. W. Rep. 37.)

JAMES THOMPSON *vs.* WILLIAM ARMSTRONG.

Claim and Delivery—Conditional Sale—Contract—Failure to Record—Attachment.

Construing section 4732, Rev. Codes: This is a claim and delivery action to recover the possession of a stallion owned by the plaintiff, and delivered by him to one Thomas Creath, upon conditions embodied in a contemporaneous writing, signed by plaintiff and Thomas Creath, which writing was never filed as required by said statute. The writing embraced a contract of conditional sale, and by its terms gave Creath only the naked possession of the stallion until the stipulated conditions were performed, and the title was expressly reserved and continued in the plaintiff until performance. Creath never fulfilled the conditions of the contract, but abandoned the stallion and left the country. The defendant seized the animal as the property of Creath, under an attachment issued by a justice of the peace, and when this action commenced defendant held the stallion under said attachment. At the trial plaintiff put the written contract in evidence, together with oral testimony tending to show that Creath had not complied with the terms of the writing, and had not paid for the stallion. Defendant offered no testimony. On defendant's motion the trial court directed a verdict for the defendant upon the ground that the plaintiff had not made out a prima facie case, inasmuch as the conditional contract had not been filed under said statute. *Held*, that the order directing such verdict was error.

Pleading and Proof.

Held, further, for reasons stated in the opinion, that the defendant neither alleged nor proved a state of facts bringing the defendant within the benefits of said statute.

Appeal from District Court, Stutsman County; *Winchester*, J.

Action by James Thompson against William Armstrong. Judg-

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ment for defendant, and plaintiff appeals. Reversed.

S. E. Ellsworth, for appellant.

Jerome Parks, for respondent.

WALLIN, C. J. This action was brought to recover the possession of a stallion, which stallion, at the commencement of the action, was in the defendant's possession. The sheriff, under claim and delivery proceedings, took possession of the stallion, and delivered him to the plaintiff, and plaintiff was, at the trial, in possession of the animal. The complaint alleges title in the plaintiff, and plaintiff bases his alleged right of possession upon title and ownership of the stallion. Defendant answered the complaint, denying the plaintiff's ownership, and alleging that one Thomas Creath, at the commencement of the action, was the owner of the stallion. Defendant's answer further states, in substance, that the defendant, before the commencement of this action, had taken possession of the stallion while the stallion was in the possession or under the control of said Thomas Creath; that such possession was taken by defendant as a constable of said county, "under a writ of attachment issued out of the court of John S. Tufford, one of the justices of the peace of said county; and that the defendant was one of the constables of said county, and was at the commencement of this action holding said stallion as the constable to whom the said writ of attachment was directed." Upon these issues the case was tried to a jury, and, after plaintiff had submitted his testimony, and rested his case, counsel in behalf of the defendant moved for a directed verdict, which motion was granted. Upon this feature of the case the record is as follows: "The defendant moves the court to direct the jury to find a verdict for the defendant for the reason that the plaintiff has failed to make a prima facie case for the ownership of the stallion, Prince Wilkes, for which this action is brought, it appearing that said Exhibit A is a contract of conditional sale, and the same not having been filed as required by section 4732 of the Revised Codes of North Dakota. The motion is granted by the court, to which action of the court the plaintiff duly excepts. The court: The motion of the defendant is granted, and the foreman of this jury is directed to sign the verdict presented by the defendant's counsel. To which ruling and direction of the court the plaintiff by his counsel excepts. Thereupon the jury, under the direction of the court as aforesaid, found the following verdict: 'We, the jury, find for the defendant. We find that the defendant was and is the owner of the horse, and entitled to the immediate possession thereof; and that the value of his interest in said horse is three hundred dollars.' To which verdict of the jury and the entry thereof by the court the plaintiff duly excepts." Pursuant to said verdict and an order directing the entry of judgment, the following judgment was entered in the district court: "Wherefore * * * it is ordered and adjudged that the defendant have and recover of and from said

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plaintiff the immediate possession of the certain stallion, Prince Wilkes, and described in plaintiff's complaint, or the sum of three hundred dollars, with interest thereon at the rate of seven per cent. from and after the 17th day of January, 1901, besides for costs in this action, the same to be allowed and taxed by the clerk of said court." Error is assigned in this court upon the order granting the motion to direct a verdict, and upon rendering and entering such verdict, and upon the order for judgment and upon the judgment.

The only evidence offered at the trial was introduced by the plaintiff, and, except the testimony of the sheriff upon features of the case not now material, the evidence consisted of the oral testimony of the plaintiff and a certain written agreement signed by plaintiff and Thomas Creath, which is dated June 22, 1900. Plaintiff testified, in substance, that on or about the date of the written agreement he delivered the possession of the stallion to said Creath; that plaintiff next saw the stallion on July 4, 1900, when he was in Creath's possession, and that plaintiff did not see him again until the 2d day of January, 1901. The animal was seized and turned over to plaintiff about January 17, 1901. The testimony tends to show that Creath had abandoned the horse and left the country some time prior to the commencement of the action. The written agreement in evidence is too long to quote at length, but its terms are to this effect: Plaintiff agreed conditionally "to well and truly sell" the stallion to Creath for the price of $600, but such sale was "not to be made" until the conditions named in the writing were fully and completely performed. It was stipulated that immediate possession was to be given Creath, and the animal was turned over to Creath accordingly, but the writing expressly stated that Creath should acquire "no right, interest, lien, or claim to said stallion, except naked possession," until he had fulfilled the agreement according to its terms and stipulations. The writing stipulated that the contract should be fully completed on October 1, 1901; also that on default of any of the covenants of the agreement the plaintiff or his agents "may at any time, at his or their option, declare this contract at an end," and retake possession of the said stallion, and "put an end to this contract in all things, retaining to the party of the first part [plaintiff] any and all payments, benefits, and profits which the party of the second part may make or render to the party of the first part hereunder, collateral to one certain note even date herewith." The writing in general terms required Creath to provide the necessary food for the stallion, to carefully keep and groom and in all respects care for the animal in a proper manner. Also required Creath to keep and stand the stallion for breeding purposes, and to take and turn over to plaintiff all the liens and proceeds derived from breeding the animal to mares, and that such proceeds should be credited on the contract. At the time the stallion was turned over to Creath the plaintiff received from Creath one horse of the agreed value of $100 and two promissory notes, each for the face

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amount of $100. At the time of the trial one of the notes had been paid and the other had not been paid. As to the horse and notes, plaintiff testified: "I received two notes and a horse. The face of the notes was $100 each. The estimated value of the horse was $100. It is a fact that I turned the horse over to Creath. He paid two notes and a horse, and turned them over to me. I did not give him credit for $300. I don't credit notes until they are paid. In a sense I gave him credit for the notes. I took possession of them, and exercised ownership over them, and do yet. Have from that day until this." On cross-examination plaintiff testified, referring to Creath, "He did not pay me very near the value of the horse at the time he got him." Plaintiff further testified, in effect, that when he reclaimed possession the stallion, at the market price, was worth $300; but further testified that for breeding purposes the animal was worth more than that amount. This review of the evidence will suffice to show that Thomas Creath had not, at and prior to the commencement of this action, performed or fulfilled the conditions stipulated in the written agreement. He had abandoned the stallion and quit the country. The stallion was not paid for by him as required by the writing, and no part of the purchase price had been paid except as already stated. Upon this state of facts it is manifest that the title to the stallion (which had been expressly reserved to the plaintiff in the writing) was, at the time of the trial, vested in the plaintiff. It follows that at the close of the testimony, and when the verdict for defendant was directed, the plaintiff had made out at least a prima facie case of ownership and right of possession in himself. Upon this state of the evidence the order directing a verdict for defendant was manifestly error, unless some fact not hitherto mentioned justified the order.

The only other testimony or fact in the record which is relied upon as a justification of the order is to be found in the language of the motion for a directed verdict, which has been set out at length, and it is to the effect that the agreement in writing, which is —and, we think, correctly—described in the language of the motion as a "contract of conditional sale," had not been filed as required by section 4732 of the Revised Codes. It is apparant that the order directing the verdict was based upon the omission to file the contract, and in making the order it must have been assumed by the trial court that the plaintiff's failure to file the contract, as against the defendant, operated to vest the title of the stallion in Thomas Creath, and to justify the defendant's seizure under the attachment. But the mere failure to file the contract did not alter its provisions, nor impair any of its obligations. As between plaintiff and Thomas Creath, the title of the horse was vested in the plaintiff until the conditions of the contract were performed, and any omission to file the instrument could not, as between plaintiff and Creath, operate to transfer the title to the latter. It appearing, therefore, from the evidence, that the plaintiff was, and at all times in question had been,

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the owner of the stallion, such evidence was entirely sufficient prima facie to entitle plaintiff to recover in the action. Ownership draws to it the right of possession until a better right is made to appear. The plaintiff being the owner, it follows that the defendant's seizure of the stallion by attachment, as the property of Thomas Creath, constituted no defense until the facts necessary to justify the seizure are first established. In this case it became incumbent upon defendant to aver and prove that the defendant was within the benefits of the statute requiring contracts such as that in question to be filed. No such facts were alleged in the answer and no attempt to prove them was made at the trial. Section 4732, Rev. Codes, reads: "All reservations of the title to personal property, as security for the purchase money thereof, shall, when the possession of such property is delivered to the vendee, be void as to subsequent creditors without notice and purchasers and incumbrancers in good faith and for value, unless such reservation is in writing and filed and indexed the same as a mortgage of personal property. In indexing such instruments the register of deeds shall treat the purchaser as mortgagor and the vendor as mortgagee." Defendant does not claim the possession of the stallion upon the ground that he is either a purchaser or an incumbrancer of the animal. If defendant has any rights under the statute, such rights must be based upon a claim that he is a "subsequent creditor without notice," or, if not such, that as an officer he stands in the shoes of a subsequent creditor without notice. The omission to file the contract, as has been seen, does not operate to render the same void in toto, nor void as between the parties to it. Such omission, by the terms of the statute, renders it void only as to certain classes of persons; among others, "subsequent creditors without notice." As to other classes not referred to in the statute, the omission to file is of no consequence. In the case at bar the defendant has not succeeded in placing himself within the class of "subsequent creditors without notice," nor does defendant, by either allegation or proof, show or attempt to show that he represents a subsequent creditor without notice. Under the facts of this case, the contract not being filed, creditors of Thomas Creath who had no notice of the existence of the contract, and who became creditors after the stallion was delivered to Creath, would be in a position, under an attachment issued in an action against Thomas Creath, to seize the stallion as the property of Thomas Creath. But none of these vital facts are alleged in the defendant's answer, and no attempt was made to prove them, or any of them, at the trial. The answer states, in effect, that the defendant had seized and was holding the stallion under an attachment issued out of a justice's court; but this is far from being sufficient. The answer contains no averment that the attachment issued in any action whatsoever, nor does the answer allege that the attachment issued in an action in which a creditor of Thomas Creath was a party, nor that it issued at the instance of any subsequent creditor of Thomas Creath who had

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no notice of the existence of the conditional sale contract, and no notice of plaintiff's actual ownership of the stallion. It must follow that the defendant, under the evidence, in attaching the stallion, occupied the position of a wrongdoer. Under the evidence before the trial court the seizure of the animal by the defendant as the property of Thomas Creath was wrongful, and wholly without legal authority. Under these circumstances it was clearly error to direct any verdict in favor of the defendant, and the verdict actually rendered was obviously erroneous in awarding damages in favor of the defendant.

Our conclusion is that the judgent appealed from is erroneous, and the same will therefore be reversed. All concur.

(91 N. W. Rep. 39.)

WITTE MANUFACTURING COMPANY *vs.* J. J. REILLY, *et al.*

Sale—Cash on Delivery—Waiver.

On a contract, for the sale of personal property, which provides that payment shall be made in "cash when the goods are delivered," the provision for cash payment on deliverv may be waived by the acts or conduct of the seller.

Delivery.

An unconditional delivery of property to a carrier under such a contract is a delivery thereof to the purchaser.

Waiver of Conditions.

Whether there has been a waiver of the conditions of a contract by an apparently unconditional delivery is a question of fact, to be determined from such delivery anu all other facts in the case, including declarations and conversations of the parties tending to show what the intent of the party delivering was.

Improper Evidence.

On the trial the following question was asked the plaintiff and answered under objection: "Did you ever, Mr. Witte, intend to part with the goods except as they were paid for with cash?" *Held* prejudicial error.

Appeal from District Court, Cavalier County; *Sauter,* J.

Action by John C. Witte, doing business as the John C. Witte Manufacturing Company, against J. J. Reilly and D. P. Jameson. Judgment for plaintiff. Defendants appeal. Reversed.

Cleary & McLean and *John H. Fraine,* for appellants.

Charles G. Laybourn, for respondent.

MORGAN, J. This is an action in claim and delivery, brought to secure the possession of certain drug-store fixtures, consisting of wall cases, prescription counter, and show cases.

The trial in the court below resulted in a verdict for the plaintiff.

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A motion for a new trial, based on a statement of the case, was denied. This appeal is from the order refusing to grant a new trial. Errors are assigned on the introduction of evidence, duly objected to, and the refusal to grant a new trial, and there are other assignments of error. The facts, as developed at the trial, so far as material in the determination of this appeal are as follows: The plaintiff is a manufacturer of store fixtures, and does business in Minneapolis in the name of the John C. Witte Manufacturing Company. The defendant Reilly is engaged in the drug business at Milton, N. D. On or about October 25, 1897, the defendant went to the plaintiff's place of business at Minneapolis for the purpose of securing the prices of such fixtures as he desired to purchase. He there met the plaintiff, and a general conversation followed as to what the defendant desired to purchase. The defendant, however, was not then able to give the exact measurements of the building in which he intended to use such fixtures. No definite arrangements were concluded at this meeting in regard to the purchase of such goods, for the reason that such measurements were not at hand, and for the reason that Reilly wished to obtain prices from other manufacturers. It was therefore agreed that the defendant should send plaintiff the exact dimension of his store upon his arrival at Milton, after which the plaintiff would send the prices of the goods, which were to be the lowest cash prices. The defendant sent the measurements, and the plaintiff thereafter sent to the defendant the prices for the fixtures in the following letter to the defendant:

"Minneapolis, Minn., Nov. 2, 1897. J. J. Reilly, Milton, N. D. —Dear Sir: We will make and deliver on board cars in the city of Minneapolis, in good order, the following store fixtures, according to plans and specifications furnished by us and approved by you, all exposed work to be made of oak finished in the best possible manner, for the sum of $290 cash when work is delivered. Yours truly, J. C. Witte Mfg. Co.

"Signed and accepted by J. J. Reilly."

This letter and the acceptance in writing of its terms by Reilly constitute the contract under which the fixtures therein described were agreed to be sold and delivered. Show cases were also agreed to be sold under an offer from plaintiff, duly accepted by defendant, but the details of that contract will not be mentioned, as the case will be disposed of on the ground that evidence was received on the trial erroneously which was prejudicial and must result in the granting of a new trial. The plaintiff immediately commenced the manufacture of the fixtures upon receipt of the accepted order, which was about November 6th. On December 6th the plaintiff delivered these goods to the Great Northern Railway Company at Minneapolis, consigned to the defendant at Milton. The plaintiff took a bill of lading from the railway company, in which Reilly was named as consignee, and immediately sent it to him at Milton. He also wrote him a letter on the same day, explaining the delay in

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manufacturing the fixtures. He also then sent him a statement of the fixtures sent and the prices as hitherto agreed upon. In none of these inclosures was there any statement that the purchase money should be immediately remitted, nor was there anything in them about payment at all. On December 22d plaintiff again wrote defendant asking him for an explanation why the fixtures had not been taken by the defendant from the freight depot, as the company's agent had written plaintiff that the goods had arrived at Milton. There was nothing said in this letter about payment or remittance of the money due on the purchase. The defendant answered this letter and explained that the goods had been there only a day or two, and asked plaintiff for the proper freight rate, as he thought he had been compelled to pay too much freight and had paid it under protest. On December 27th the plaintiff wrote him, in answer to this letter, and stated what the proper freight rate was. He said nothing in such letter about the condition under which he now claims that he had delivered the fixtures to the company, nor did he say anything as to remittance of the purchase money. The defendant, Reilly, did not remit any money on account of the purchase price, nor mention the subject in any of his letters. On January 6, 1898, plaintiff again wrote to Reilly, but his letter is not produced. The plaintiff testified: "And I wrote him again on the 6th of Jan., and when I found that Dr. Reilly didn't keep his agreement I went to my atty. and asked him to go and replevin the goods and get them in my possession again. Then this suit was commenced." The suit was actually commenced on March 24th. Before such date the fixtures had been sold to the defendant Jameson; when sold, does not appear. No question is raised on this appeal growing out of such sale. It is stipulated that no point be raised on behalf of the defendant Jameson. The evidence bearing on the question of such sale to Jameson is not produced in this court, and the appeal is to be determined as though no sale had been made.

On the trial it was contended by the defendants that the delivery of the goods was unconditional, and passed the title and possession thereof to the defendant Reilly completely and without any reservation. On the part of the plaintiff it was contended that such delivery was made pursuant to the terms of the agreement for a sale, and therefore conditional, and that the title did not pass until payment was made. Whether the title passed, by the delivery to the carrier, to the defendant Reilly, became a material issue on the trial. The contract under which these goods were manufactured and delivered provided that the goods were to be paid for in "cash when the work was delivered." The contract did not ripen into a completed sale until there had been a delivery and a payment, unless there was a waiver of the terms of the contract. Under such contract, delivery and payment were to be concurrent acts. The plaintiff was therein obligated to deliver the property, and the defendant was obligated thereupon to pay for it. Either or both of these conditions of the

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contract might be waived by the parties. The plaintiff could waive the condition that payment must be made when the goods were delivered, and the defendant might pay for them before delivery. Whether the condition of the contract that payment should be made when the goods were delivered was waived by the plaintiff, by delivering them without any express conditions made at the time of the delivery, was an issue at the trial. On the trial, the plaintiff's attorney asked the plaintiff, while testifying, the following question: "Did you ever, Mr. Witte, intend to part with the goods except as they were paid for with cash?" The question was objected to on proper grounds stated, and the objection overruled. The witness answered the question in the negative, and appellants urge that the admission of such answer was prejudicial error. Whether the conditions of a contract had been waived in any case is a question of fact to be determined from a consideration of all of the evidence in the case, including the contract, conversation, declarations at the time of delivery, all other facts or circumstances connected with the case and the delivery.

Before the title passes to the purchaser, in cases of sales for cash, where delivery and payment are to be concurrent acts under the contract, the intent with which the delivery was made becomes a material question. The condition would not of necessity be waived if nothing is said when the delivery is made as to the intent in making such delivery. If the intention that the delivery is conditional can be inferred from the conduct and acts of the party delivering, then the title will not pass. It is optional with the seller whether he will waive the condition by an unequivocal and unrestricted delivery or not. If he delivers the property unconditionally, such delivery, considered alone, is presumptive evidence of a waiver of the condition that title shall not pass until payment is made. *Fishback* v. *Van Dusen*, 33 Minn. 117, 22 N. W. Rep. 244; *Scharff* v. *Meyer*, 133 Mo. 428, 34 S. W. Rep. 858, 54 Am. St. Rep. 672; Mechem, Sales, § 549; *Haskins* v. *Warren*, 115 Mass. 514; *Hammett* v. *Linneman*, 48 N. Y. 399; Benj. Sales, p. 282. This presumption is subject to be overcome by the acts or declarations of the seller or the circumstances surrounding the delivery, although not immediately connected therewith or occurring at the immediate time of the delivery. *Hammett* v. *Linneman*, supra. The purposes of such delivery as shown by facts may be given as bearing on the intent with which it is made. *Rosenbaum* v. *Hayes*, 5 N. D. 476, 67 N. W. Rep. 951.

An unconditional delivery to a carrier for shipment to the purchaser is a delivery to the purchaser. Mechem, Sales, § 739.

The delivery to the carrier in this case was apparently unconditional, but such delivery was not conclusive evidence that the condition that the price was to be paid on delivery was waived. The plaintiff had a right to rebut the prima facie effect of such unconditional delivery by showing any facts or circumstances existing at

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the time, or that existed before the delivery, in explanation of such delivery or as showing his intention or reasons or purposes in so delivering the property.

The question objected to by the defendants related to the undisclosed and secret intention of the plaintiff at the time of the delivery. It called for no fact existing outside of the plaintiff's mind. It called for a bald conclusion as to the plaintiff's intent, unsupported by anything occurring at the time of the delivery as a fact, to show an intention by the delivery contrary to what the act itself imported. To permit a contradiction of the legal effect of such delivery by his secret and undisclosed intention would, in our opinion, be going too far even under the wide latitude allowed to show the intention of parties in the performance of particular acts. That would be permitting the plaintiff to change the relations between himself and the defendant, as created by his acts, by stating his own unspoken intention. What his intention was, was a question of fact to be found by the jury from facts shown in evidence, irrespective of his own unexpressed intent. "Hence the important question, in determining whether there has been a waiver of a condition of sale, is, has the vendor manifested, by his language or conduct, an intention or willingness to waive the condition, and make the delivery unconditional and the sale absolute without having received payment or the performance of the condition of sale? This must depend on the intent of the parties at the time, to be ascertained from their conduct and language, not from the mere fact of delivery alone. It may be proved by various species of evidence: by declaration, by acts, or by forbearance to acts." *Fishback* v. *Van Dusen,* supra. See, also, Mechem, Sales, § 551; *Railroad Co.* v. *Kinchen* (Ga.) 29 S. E. Rep. 816; *Sutter* v. *Rose* (Ill.) 48 N. E. Rep. 411; *Germain* v. *Lumber Co.*, (Mich.) 74 N. W. Rep. 644; *Zimmerman* v. *Brannon,* (Iowa) 72 N. W. Rep. 439. "In a sale of specific chattels an unconditional delivery to a buyer or his agent, or to a common carrier consigned to him, whether a bill of lading is taken or not, is sufficient to pass the title if there is nothing to control the effect of it. If the bill of lading or written evidence of the delivery to a carrier be taken in the name of the consignee or be transferred to him by indorsement, the strongest test is afforded of the intention to transfer the property to the vendee. * * * If the vendor intends to retain the right to dispose of the goods while they are in course of transportation, he must manifest that intention at the time of their delivery to the carrier. It is not the secret purpose, but the intention as disclosed by the vendor's acts and declarations at the time, which governs." *Wigton* v. *Bowley,* 130 Mass. 252. "Consigning the goods without restrictions to the purchaser, or assigning and transmitting to him a bill of lading, are strong evidences of an intention to pass the title, and cannot be controlled by secret determinations to the contrary." Mechem, Sales, § 740. "A mere mental act on the part of the seller will not suffice if it be not accompanied by some outward act in-

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dicative of a purpose, and legally sufficient to retain a hold upon the title other than the mere right of stoppage in transitu." Mechem, Sales § 771. The cases cited by the appellants to show that the question was a proper one are not in point upon the facts of this case. They refer to direct evidence of a person's intent when charged with fraud or with a felonious homicide, or whether fraudulent representations were relied on, or as affecting damages in actions for malicious prosecutions and other similar actions. For these reasons we conclude that the admission of the answer to the question objected to was erroneous. The jury was thereby allowed to consider the unexpressed intentions of the plaintiff in delivering the goods to the carrier, and thereby to defendant, although inconsistent with the act of delivery itself. If the delivery was unconditional, the terms of the contract were thus waived by such delivery, and the plaintiff's intention, unexpressed, cannot be shown in contradiction of the legal effect of such delivery. Such testimony was of a character that would influence the jury to believe that there was no waiver of the condition of the contract, and its admission was without doubt prejudicial.

The order refusing a new trial is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

(91 N. W. Rep. 42.)

JAMES THOMPSON *vs.* GEORGE THOMPSON.

Claim and Delivery—Evidence—Demand—Necessity.

This action was brought to recover the possession of personal property owned by the defendant, and which was in defendant's possession when suit was brought. Plaintiff alleges a right of possession under a chattel mortgage, and alleges breaches of the conditions of the mortgage, and also a demand of the property, and refusal to deliver, before suit brought. Defendant answered, admitting the execution and delivery of the mortgage and notes secured thereby, but specially denied plaintiff's ownership of the notes and mortgage, and alleged that nothing was due on the notes. The answer also denied the alleged demand, and specially denied all the breaches of the conditions of the mortgage as set out in the complaint. At the trial the defendant offered evidence to sustain the various defenses pleaded in his answer, and throughout the trial the defendant contested plaintiff's right to recover upon the ground of a superior right of possession in himself. *Held*, under this state of the pleadings and the evidence, that the issue of a demand and refusal before bringing suit was eliminated as an issue for the jury, inasmuch as it appeared that any such demand, if made, would have been unavailing.

Demand—Instruction to Jury.

The trial court, in an instruction to the jury, set out at length in the opinion, charged the jury, in effect, that a demand and re-

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fusal before suit were essential to any recovery by the plaintiff. *Held*, under the evidence, that such instruction was prejudicial error.

Appeal from District Court, Stutsman County; *Winchester*, J.

Action by James Thompson against George Thompson. Judgment for defendant, and plaintiff appeals. Reversed.

S. E. Ellsworth, for appellant.

Jerome Parks, for respondent.

WALLIN, C. J. This is a claim and delivery action, brought to recover the possession of certain horses and mares belonging to the defendant, upon which the plaintiff has a chattel mortgage, given by the defendant to secure certain promissory notes of the defendant, described in the mortgage. The complaint is not assailed for insufficiency, and the same embraces the usual allegations in such cases, embodying, among others, an allegation that the plaintiff is entitled to the possession of the property described in the mortgage, and that the plaintiff has demanded the possession of the property from the defendant, but defendant has refused and still refuses and neglects to deliver the same, or any part of the same, to the plaintiff, and that defendant wrongfully and unlawfully detains the possession from the plaintiff. Defendant answered the complaint, admitting the execution and delivery of the notes and mortgage described in the complaint, and denying that plaintiff demanded the possession of the property as alleged in the complaint, and especially denying any breach of the conditions of the mortgage, and denying that the property is wrongfully detained from the plaintiff, or that plaintiff is entitled to the possession thereof. The case was tried to a jury, and a verdict was returned for the defendant, from which judgment an appeal is taken.

In this court error is assigned upon an order of the trial court overruling an application of the plaintiff for a continuance; also upon certain instructions of the trial court, given in its charge to the jury. We shall have occasion, in disposing of the case, to refer to but one of the errors assigned, which we think must be sustained, as embracing prejudicial error. At the trial, evidence was offered by both parties upon the merits, and in support of the controverted questions of fact as set out in the pleadings; and the abstract shows that the defendant called witnesses and introduced testimony to sustain the allegations of his answer, denying the plaintiff's alleged right of possession, and tending to show a superior right of posession in the defendant. The assignment of error under consideration shows that at the close of the testimony the trial court, in its charge to the jury, among others, gave the following instructions to the jury: "Now, if you find from the evidence that the plaintiff is entitled to the possession of the property in question at the time the suit was begun, before the plaintiff could recover in this case it will be necessary for

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you to further find that the plaintiff demanded of the defendant the property in question for this reason: The defendant, in the first instance, as I have intimated, was entitled to the possession of the property by virtue of being the owner thereof. He was entitled to the possession of it; that is, he came rightfully into possession of it. Whenever a party comes rightfully into possession of personal property, it is necessary, before the property can be taken from him in any manner, that a proper legal demand be made of him. So, in this case, before the plaintiff could take the property, or before he would be entitled to take it away, although he might have a right to its possession, yet he could not take it; he must demand it. In order that you may understand a little more of that, I will read you something in reference to a demand: 'In order to make a legal demand of articles of personal property by one person from another, such property must be indicated by name, or by proper words of description or reference, so as to apprise the party of whom demand is made what particular property is demanded; otherwise such demand would not be sufficient were he to bring an action in claim and delivery for the detention of such property.' So, in this case, gentlemen, you will call to mind the testimony, and see whether or not such demand has been made in this case. If you find, then, that the plaintiff was entitled to the possession of the property, and, further, that legal demand was made for it, then your verdict should be for the plaintiff for the possession of the property, and, as I have said, also for the damages, if any have been claimed and proved for its detention. To put in a little plainer language the thoughts I have tried to express, I will read a little from an eminent jurist upon this question: 'Before the plaintiff can recover in this action, he must prove by a preponderance of the evidence that, at the time of the commencement of the suit, he was then entitled to the immediate possession of the same; and he must also further prove that the defendant wrongfully detained it from the plaintiff after a demand made upon him by the plaintiff for the property.'" Defendant excepted to the giving of this instruction.

The instruction is not subject to criticism in so far as it announces an abstract rule of law. It is a general rule of law that a demand and refusal to deliver the possession of goods and chattels, where the defendant lawfully acquired and lawfully holds the possession, is an essential prerequisite to an action to recover the possession; but this rule is a technical one, and it does not by any means follow that a failure to make such preliminary demand will in all cases operate to defeat an action to recover personal property or its value. The omission to make demand, when demand is necessary, will, under the better authorities, be excused under certain conditions. The reason underlying the rule requiring a demand is the legal presumption that a party who is not the owner of property, and has no right to retain the possession thereof, will, on demand, surrender the possession to the party en-

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titled thereto, and do so without suit; but, where it appears that a demand would have been unavailing if made, no proof of demand and refusal is required. See *Raper* v. *Harrison* (Kan. Sup.) 15 Pac. Rep. 219, and authorities cited in that case. The better rule undoubtedly is that, where a demand before suit is necessary, a failure to prove the demand at the trial will not defeat the action where it appears, either from affirmative allegations in the pleadings or the evidence, that a want of demand is not relied upon as a defense, but, on the contrary, that the plaintiff's alleged right of possession is contested on the merits, and on grounds of a superior right of possession in the defendant. See *Myrick* v. *Bill*, 3 Dak. 284, 17 N. W. Rep. 268; *Brietenwischer* v. *Clough* (Mich.) 69 N. W. Rep. 88, 66 Am. St. Rep. 372; *Irrigation Co.* v. *Hawley* (S. D.) 63 N. W. Rep. 904; *Guthrie* v. *Olson* (Minn.) 46 N. W. Rep. 853; Cobbey, Repl. § 448. The rule is stated in Shinn, Repl. § 311, as follows: "When the defendant contests the case on the merits wholly upon the claim of ownership and right of possession of the property in himself, no previous demand is necessary, even for the purpose of entitling the plaintiff to recover costs in case of a verdict in his favor;" citing *Rodgers* v. *Graham*, 36 Neb. 730, 55 N. W. Rep. 243. See, also, Am. & Eng. Enc. Law (2d Ed.) p. 209, and cases cited in note 5.

The note and mortgage were made and delivered to one Thomas Creath, and the complaint alleges that Creath transferred them to the plaintiff for a valuable consideration, and that plaintiff is the owner thereof. This allegation is denied by the answer. This defense goes to the merits, and, if defendant established the fact that the transfer of the paper to plaintiff was not made, it would defeat the plaintiff on the merits. The answer, as an affirmative defense, states, in effect, that nothing was due plaintiff, and alleges in that behalf that, after this action was brought, plaintiff brought an independent action, based upon the note which was then due, and in such action obtained judgment against defendant for the amount due on the note, and that defendant had paid such judgment, thereby leaving nothing due plaintiff at the time the answer in this action was served. This defense was interposed upon the merits of the controversy, and was intended to defeat plaintiff's action upon grounds other and independent of the matter of a mere demand for the property before suit. It therefore conclusively appears alike from the pleadings and from the evidence that the defendant at the trial contested plaintiff's alleged right of possession not alone upon the technical ground of a failure to show a demand of delivery and refusal to deliver before suit brought, but also upon the ground of a superior right of possession in the defendant. Hence it appears that a previous demand, if made by the plaintiff, would have been wholly unavailing. It was therefore error to give the instruction to the jury which is above set out. The jury should have been distinctly informed by the trial court that the matter of a preliminary demand,

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which by the pleadings was put in issue, had been eliminated as a factor in the case, inasmuch as the defendant had contested the action upon the ground of a superior right of possession in himself. The instruction as to the damand was emphatic, and was much elaborated; and, under the evidence, it may well have led the jury to return the verdict which was returned. Therefore the error was prejudicial to the plaintiff.

For such error the judgment must be reversed, and a new trial granted. All the judges concurring.

(91 N. W. Rep. 44.)

WILLIAM C. CLOPTON *vs.* JOSEPHINE CLOPTON.

Divorce—Reference.

This action was brought to obtain a divorce from the bonds of matrimony upon the ground of extreme cruelty. Defendant appeared by attorney, who served and filed an answer to the complaint, which admitted the marriage and denied all other allegations of the complaint. After issue was joined, the trial court, upon the written consent of counsel, by its order referred the case, with directions to take the testimony and report the same to the court; and thereafter the referee took the testimony, and reported the same to the court, but did not make or report any findings in the case.. *Held*, that such reference was properly made despite the fact that the statute (article 7, c. 10, Code Civ. Proc.) does not in terms authorize such limited reference. In divorce cases the jurisdiction is of statutory origin, but the procedure, unless the statute otherwise directs, is that which obtains in courts of chancery. In such courts the authority to require a master or a referee to take and report the evidence, either with or without findings is inherent.

Waiver of Objections.

A reference having been consented to, counsel cannot object to the same for the first time in this court.

Corroboration as to Marriage.

The fact of the intermarriage of the parties was alleged in the complaint, admitted in defendant's answer, and testified to by the plaintiff, but such testimony was not corroborated. *Held*, construing section 2757, Rev. Codes 1899, that said testimony of the plaintiff did not require corroboration.

Residence Sufficient.

Evidence examined, and *held*, that the plaintiff's residence in this state in good faith for 90 days prior to commencing this action is established, and that the plaintiff's testimony as to such residence is sufficiently supported by corroborating evidence.

Hearsay—Corroboration by Physician.

The plaintiff testified fully and in detail to the facts alleged as grounds of action and to the results produced upon his health by the alleged extreme cruelty of the defendant, and testified also that

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he consulted a physician and took medical treatment as a means of obtaining relief from bodily ailments caused by the cruel and inhuman treatment he received at the hands of defendant. This testimony was corroborated by the physicians who treated the plaintiff for the bodily ailments which the plaintiff stated to his physician were caused by the strain and worry arising from his domestic troubles. *Held*, that the testimony of the physicians was competent under an exception to the rule excluding hearsay evidence, and that such testimony constituted corroboration, within the meaning of section 2757, supra.

Collusion Excluded by Evidence.

The statute requiring corroborating evidence in support of the statements, admissions, or testimony of the parties voices a rule of ancient origin, and the purpose of the rule is to guard against the evil of granting collusive divorces. Accordingly, it is *held*, where the element of collusion is excluded, that the reason for the rule falls; and in such cases, while there must be corroborating evidence to satisfy the statute, such evidence need not extend to every feature of the matrimonial offense. The degree of corroboration is not defined or specified in the statute. Said statute is adopted from the Code of California, and the adjudications of that state construing the same are adhered to in this case.

Appeal from District Court, Morton County; *Winchester*, J.

Action by William C. Clopton against Josephine Clopton. Judgment for plaintiff, and defendant appeals. Affirmed.

Cochrane & Corliss and *E. C. Rice*, for appellant.

Newman, Spalding & Stambaugh, for respondent.

WALLIN, C. J. This action was brought to obtain a divorce from the bonds of matrimony, and the plaintiff alleges extreme cruelty as a cause of action. On February 2, 1899, the court below entered judgment divorcing the parties. Defendant has appealed from the judgment, and in the statement of the case, which embraces all of the evidence offered and proceedings had at the trial, the defendant demands a retrial of all the issues in this court. The complaint alleges that plaintiff and the defendant intermarried on or about the 16th day of December, 1896, in the state of New York, and that there are no children living as the issue of such marriage; and further alleges "that the plaintiff now is, and for a period of more than ninety days immediately preceding the commencement of this action has been, a resident of this state in good faith." The plaintiff also alleges in general terms that defendant is a woman of violent and ungovernable temper; that ever since said marriage the defendant has abused and cruelly maltreated the plaintiff, and that on two occasions, to wit, on June 29, 1898, and on October 15, 1898, the defendant assailed and struck the plaintiff; and that defendant's cruel and inhuman treatment of the plaintiff has caused the plaintiff great mental suffering, and impaired plaintiff's health to such an extent that he has been rendered unfit to attend to his business affairs. The answer of the defendant, after admitting the averment of marriage, de-

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nies all the other allegations of the complaint. Defendant's answer was served and filed in the district court on the 26th day of January, 1899, one James E. Campbell, an attorney at law, residing at Mandan, N. D., appearing for defendant, and verifying her answer. The record shows that on the 2d day of February, 1899, the following stipulation in the action was filed with the clerk of the district court for Morton county: "It is hereby stipulated by and between the plaintiff and defendant that the above-entitled action be referred to Lydia W. Heuman to take the testimony therein, and that all the depositions taken in said action be submitted to the court; and it is further agreed that said cause be submitted to the court for determination and decision at the chambers of the judge of said court at Bismarck on February 2, 1899, at 2 o'clock p. m. Dated February 2, 1899. H. G. Voss, Attorney for Plaintiff. J. E. Campbell, Attorney for Defendant." On the same day the judge of the district court made an order of reference in the action as follows: "The above cause being an issue upon the complaint of the plaintiff and the answer of the defendant thereto, and it being agreed between the counsel for the plaintiff and the defendant, this cause being a proper case to be referred, on motion of H. G. Voss, Esq., attorney for the plaintiff, and by consent of the defendant's counsel, Lydia W. Heuman is hereby appointed referee to take the testimony in the above-entitled action on written questions and answers, and report the same to this court at her earliest convenience. W. H. Winchester, Judge of said District Court." It further appears that upon said 2d day of February, the referee made and filed her report, embracing the evidence taken by her, and that upon said day the trial court made, signed, and filed its findings of fact and conclusions of law in the action. Said findings recite, in effect, that the action was tried on February 2, 1899, and that Hoggatt, Caruthers, and H. G. Voss appeared at the trial in behalf of the plaintiff, and James E. Campbell appeared for the defendant. The first and second findings of fact are as follows: "(1) That the plaintiff now is, and ever since and for more than ninety days prior to the commencement of this action has been, a resident of the state in good faith. (2) That theplaintiff and defendant were married at New York City in the year 1896, on or about the 16th day of December, and now are, and ever since have been, husband and wife." The third finding of fact is to the effect that the charge of extreme cruelty as contained in the complaint is true, and that the specific acts of cruelty set out in the complaint were committed by the defendant, and that the cruel and inhuman treatment of the plaintiff by the defendant caused plaintiff great mental suffering, and resulted in producing sickness and nervous prostration, from which the plaintiff was and had been a great sufferer. The court, as a conclusion of law, found that the plaintiff was entitled to a divorce, and thereafter, by its order, directed the entry of a judgment in favor of the plaintiff. Where-

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upon, and on February 2, 1899, a judgment was regularly entered divorcing the parties from the bonds of matrimony.

The evidence taken and reported to the court by the refereee contained only the testimony of the plaintiff and a certain exhibit put in evidence in connection with the plaintiff's testimony, said exhibit consisting of a physician's certificate signed "J. C. Minor, M. D." In addition to the evidence reported by the referee, the plaintiff introduced the deposition of Dr. Austin W. Hollis, of New York City. The defendant offered no evidence, nor did her counsel, who was present at the trial, attempt to cross-examine the plaintiff, who testified orally in his own behalf before the referee. The appellant's counsel have assigned errors in this court briefly as follows: (1) The court erred in making its findings of fact and law without having the original complaint before the court in doing so. (2) The court erred in entering judgment, for the reason that no evidence was taken in open court, and the report of the referee did not embrace findings of fact or law. (3) The court erred in making its finding of fact, because the plaintiff's testimony was uncorroborated, (4) The court erred in making its findings of fact, because there was no corroboration of the marriage, or of the plaintiff's residence in this state in good faith. (5) The evidence did not show jurisdiction of the case in the district court.

With reference to the assignments of error relating to alleged irregularities of procedure in the case before the district court, it will suffice to say that any such irregularities, if any exist, unless they go to matters of jurisdiction, furnish no ground whatever for reversing the judgment entered below in this class of cases. The action was tried to the court, under section 5630 of the Revised Codes of 1899, and the defendant has availed herself of the right conferred by that section to bring the case to this court for trial anew upon all the evidence offered at the trial. In this class of cases a new trial is had in this court upon the merits, and this court does not sit to correct mere irregularities or errors of law occurring in the court below. Nevertheless we have considered the assignments of error. The first, in matters of fact, seems to be sustained by the record. The original complaint and the summons were served on defendant in the state of New Jersey, and the record indicates that the papers had not been returned, and were not before the court at the trial. But there is no proof before this court, and the fact cannot be presumed, that the trial court proceeded to hear and determine the case without having either copies or the original pleadings before it. The contrary presumption must be indulged in the absence of evidence upon the point. Nor do we think that the fact that no testimony was taken in open court, or that the referee, in reporting the testimony, omitted to make findings of fact or law, constitute error or irregularity. There is no statute in this state requiring that the testimony in a divorce case shall be elicited in open court, but the statute does forbid the granting of a divorce upon any

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findings of a referee alone. Such findings must, when made, be supported by the evidence, and the court is required to rest its conclusions of fact upon the testimony. Section 2757, Rev. Codes 1899, reads as follows: "No divorce can be granted upon the default of the defendant or upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee, but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged." This section contemplates that a referee may make a statement of the facts or finding of facts, but, when the same is made, the court must, in addition thereto, require proof of the allegations constituting the cause of action. But this section nowhere undertakes to prescribe the mode or manner of taking the required proof, and hence the mode or manner of taking proof must be governed by other provisions of law. But counsel cite section 5455, Rev. Codes 1899, and contend that the reference to take and report the evidence was unlawful or unauthorized for the reason that the statute governing the matter of references makes no specific provision for any such reference, but requires all references which are made by consent to be for the purpose of trying either all or a part of the issues. It will be conceded that the statute does not, where a reference is had by consent, affirmatively confer authority to order a reference for the limted purpose of taking and reporting the testimony; but in divorce cases the procedure, except as modified by statute, is that which obtains in courts of equity. See Nels. Div. & Sep. p. 16, and cases in note 1. See, also, *Sharon* v. *Sharon,* 67 Cal. 185, 7 Pac. Rep. 456, 635, 8 Pac. Rep. 709. There can be no doubt of the inherent power of a court of equity to appoint a master or referee to take and report the testimony for the consideration of the court. 17 Enc. Pl. & Prac. 986. And it is discretionary with a court of equity to send a case to a referee to report the testimony either with or without findings. In *Baker* v. *Baker,* 10 Cal. 527, under a statute practically the same as section 2757, Rev. Codes 1899, the court said: "But suits for divorce are by statute excepted from the general rule. The whole issue in that class of cases cannot be referred, even by stipulation, and the referee cannot pass upon testimony. If he makes any statement or finding of facts, the court is bound to disregard it, and base its decree upon the legal testimony taken in the case." But in the case at bar the order of reference was based upon a stipulation signed by counsel on both sides, and filed in court. Having thus consented to the reference, counsel cannot be heard to object to the same; and this is doubly true where the objection to the reference is raised for the first time in the appellate court. Upon this feature of the case a decision of this court is directly in point. See *Heald* v. *Yumisko,* 7 N. D. 423, 75 N. W. Rep. 806.

But counsel claim—and this is their principal contention—that the individual testimony of the plaintiff is wholly unsupported as to one material feature of the case, and that as to other material

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features the corroboration is inadequate, and fails to meet the requirements of section 2757, Rev. Codes 1899, above set out. Our attention is called to the fact that no witness except the plaintiff testified to the fact of marriage. But the allegation of marriage contained in the complaint is expressly admitted by the answer to the complaint. It is, of course, needless to say that in actions other than divorce actions any material fact alleged in the complaint and expressly admitted by the answer is sufficiently established for all purposes of the case. Under this rule the plaintiff's testimony as to his marriage with the defendant was entirely unnecessary. But counsel insist that the fact of marriage is the primary fact in an action for divorce, and that under the statute such fact cannot be shown by the uncorroborated evidence of the parties, even when supplemented by the admission of the parties. This contention makes it necessary to consider and construe the language of section 2757; and in doing so we have found that this section voices a rule which was established by the divorce courts in England, and was adopted in this country long prior to the enactment of the statute in the state of California, from which state it was borrowed and re-enacted by the territory of Dakota. The rule and the statute are alike intended to operate as a barrier against granting collusive divorces. A collusive divorce is one obtained by a corrupt connivance between the husband and wife, wherein one party consents or passively submits to the commissions of acts which will furnish apparent grounds of divorce; or where there is a collusive agreement to represent to a court that one of the parties has committed acts which constitute grounds for divorce. Revised Codes 1899, § § 2745, 2746. In this case there is not a scintilla of evidence of any such collusion or connivance. It is true, and there is ample evidence of the fact in the records and files of this court, that an arrangement was made between the parties with a view to avoiding a threatened scandal and of softening the asperities of a contemplated action for a divorce. *Clopton* v. *Clopton,* 10 N. D. 569, 88 N. W. Rep. 562. But such arrangements as these, when they go no further, are not amenable to judicial censure. There are no acts of recrimination pleaded by the defendant, and, so far as appears, no grounds for an action exist against the husband for a divorce. Nor is there a pretense in this record that the defendant has any defense to this action on the merits. In such cases the fact that a defendant puts in no evidence involves neither collusion nor suspicion of imposition upon the court. In some cases such a course is deemed to be meritorious. See 2 Bish. Mar. & Div. § 253. But the rule under consideration was never intended to be an obstacle in proving the fact of marriage, and it has been so distinctly held in California, in a case where a section of the code corresponding with that in this state was expressly passed upon. See *Fox* v. *Fox,* 25 Cal. 588. See, also, *Harman* v. *Harman,* 16 Ill. 85, 87. In the California case, as in this case, the complaint alleged and the answer admitted the mar-

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riage. Commenting upon this fact, the court used the following language in construing the statute of California: "The statute was framed to prevent collusion between the parties having for its object the dissolution of the marriage relation, not its creation. The fact of the marriage is fully established by the defendant's failure to deny it in her answer, and that is equivalent to the most direct proof." See, also, *Baker* v. *Baker,* 13 Cal. 88. The reasoning of these adjudications seems to be conclusive upon the point under consideration, and we shall, therefore, hold that the marriage is duly established.

But it is further claimed that the plaintiff's good-faith residence in this state is not shown by sufficient corroborating evidence. The plaintiff undoubtedly had the burden of establishing the fact of his good-faith residence in this state for the then statutory period of time, viz., 90 days, prior to commencing of this action. We think this fact was established. The plaintiff testified that he had in good faith resided in this state 90 days before he brought the action, and this evidence was supported by the testimony of Dr. Hollis, who testified as follows: "Q. Do you know where Mr. Clopton is now residing? A. In the state of North Dakota." Neither of these witnesses were cross-examined, nor did the defendant offer testimony upon the question of plaintiff's residence. The court, representing the public, did not see fit to interfere by requiring further testimony upon the matter of residence, as it might properly have done if not fully satisfied in this regard. See *Smith* v. *Smith,* 10 N. D. 569, 86 N. W. Rep. 721. We think, therefore, that the fact of residence in good faith is established by competent testimony, and that the testimony of the plaintiff is sufficiently corroborated upon this point within the meaning of the statute.

But counsel lay greatest stress upon their contention that the cause of action stated in the complaint, and to sustain which the plaintiff testified fully, strongly, and in detail, is not supported by sufficient corroborating evidence. This contention presents the only question of serious difficulty in the case. The statute (§ 2757) has crystallized a pre-existing rule of evidence in divorce cases. Our duty is to apply the rule according to its letter and spirit. The question in this case, therefore, is, what is meant by the language of § 2757, which reads: "No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties." The testimony of the plaintiff covers and fully sustains all of the material facts stated in the complaint as a cause of action. This testimony is not met by any opposing testimony. Nevertheless, under the statutory rule, the plaintiff's evidence, however convincing, is inadequate, and the same must be aided by corroborating evidence or the action must be dismissed. Has the plaintiff's evidence been corroborated? This question can be solved only by a construction of the statutory phrase "uncorroborated testimony." Does this phrase imply that every element

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and ingredient of the matrimonial offense must have the support of evidence other than the admissions or testimony of the parties? We think otherwise. To give the rule of the statute a rigid and inflexible interpretation would greatly tend, in our judgment, to defeat the ends of justice in many cases. It is a matter of common knowledge that the most serious matrimonial offenses are most frequently committed in the privacy of the home, and where none but the husband and wife are present to witness the commission of the wrongful acts. Brown, Div. p. 127. If it were to be the rule that every feature of the cause of action must be established, not alone by the testimony of the injured party, but by other witnesses as well, who are able to fully corroborate the testimony of the party, it is easy to see that very many meritorious cases would be lost, and that many suitors would be denied relief and sent out of court, and that, too, in cases in which there is found no element of collusion, and where the chancellor who dismisses the action under the compulsion of the statute is fully satisfied, from the competent evidence in the case, that a divorce should be granted. The rule of the statute places the admissions and confessions of the parties upon common ground and in the same category as the testimony of the parties, and requires that either or all combined must have corroboration. But the learned author in 2 Bish. Mar. & Div. § 781, speaking of confessions, says: "Every rule of law must be interpreted by its reason, and we have seen that the reason of the rule which renders confesisons when unaided by other evidence, inadequate for divorce, is to prevent collusion, or what actually occurred before its adoption, namely, the obtaining of divorces where the justifying direlictions did not exist. * * * But where there is no room for that element, no evidence can be stronger. Therefor the evidence accompanying and corroborating the confessions may be either such as, like them, tends directly to prove the issue, or such as simply negatives collusion." The same author, in section 729, Id., in summing up the California rule, uses this language: Therefore, where the other testimony and the other circumstances negative collusion, and leave no doubt of the truth of the confessions, the courts will act upon them." This reasoning, in our judgment, applies with equal force to the testimony of the parties. Our views have support in cases from the state of California which are based upon the identical statute we are here called upon to construe. See *Evans* v. *Evans,* 41 Cal. 104; *Venzke* v. *Venzke,* (Cal.) 29 Pac. Rep. 499. In the case last cited the plaintiff testified that she had contracted a venereal disease from the defendant, and a physician's testimony to the effect that he had treated plaintiff for such disease was deemed corroboration. In its opinion the court quotes with approval the language used in *Evans* v. *Evans,* as follows: "In the very nature of the case it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence the statute only requires that there shall be some corroborating evidence. See *Cooper* v. *Cooper,* 88 Cal. 45, 25

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Pac. Rep. 1062. In the case under consideration it must be conceded that the corroborating evidence goes no further than the testimony of physicians to the effect that they treated the plaintiff for neurasthenia, or nervous prostration, in the years 1897 and 1898, and Dr. Hollis testified that the plaintiff said to him during such treatment that his condition was the result of worry and mental strain brought on by domestic trouble, and that such bodily ailments as the plaintiff then had could be caused by mental worry and domestic troubles, such as were related to him by the plaintiff during his treatment of the plaintiff as a physician. Dr. Hollis testified as follows: "His sufferings were mainly symptomatic, mental irritability, disorders of digestion and secretions, brought about, as far as I could determine, from worry. * * * He said it was domestic trouble. Q. State whether or not his health was impaired to any extent. A. It was to the extent of being unable to perform any ordinary occupation." It is well settled that this class of evidence is admissible as an exception to the rule excluding hearsay evidence. See 1 Greenl. Ev. (16th Ed.) pp. 255, 256, and authorities. The plaintiff testified as to the results of his cruel treatment at the hands of the defendant as follows: "It has utterly ruined my health, and it is impossible for any man to live with this woman in peace and happiness." Plaintiff testified that he consulted Dr. J. C. Minor, of Hot Springs, Ark., and received a certificate from him, which was put in evidence. This certificate was received in evidence without objection, and under the statute (§ 5630, Rev. Codes 1899) this court is required to "consider" the certificate. It is, however, of little weight as testimony, but, so far as it goes, it tends to corroborate the testimony of Dr. Hollis and of the plaintiff as to the plaintiff's condition of health. In the present case we have failed to discover any grounds upon which this court should, in the interests of private justice, or with a view to public interests, direct a new trial of the action, especially as there are no facts which have come to the knowledge of this court which lead to the conclusion that a new trial would bring about a different result, or one more in consonance with justice. Counsel on both sides in their briefs have made reference to the evidence and record on the former appeal in this action. But in reaching our conclusions we have confined our investigation to the evidence and record on the appeal now under consideration. But we here take occasion to say that the opinion in the former appeal embraces an erroneous statement of fact, in this: we there said that the answer—referring to the answer filed by James E. Campbell "affirmatively admitted the plaintiff's residence in this state." See opinion, 10 N. D. 57, 88 N. W. Rep. 562. We did not then have said answer before us, and we were misled as to its contents by the appellant's abstract of its contents, which purported to give the substance of said answer. The error, was however, entirely immaterial upon the former appeal, for the reason that the question of plaintiff's residence was not involved on that appeal.

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Our conclusion is that the judgment of divorce should be affirmed, and this court will so direct. All the judges concurring.

(91 N. W. Rep. 46.)

LIZZIE FLEISCHER *vs.* ERNSTENIA FLEISCHER.

Quieting Title—Evidence—Public Lands—Illegal Contract.

Defendant's husband made a timber-culture entry upon certain land, and thereafter deserted the defendant. Defendant, believing that she could not, as a married woman, contest the entry of her husband, and fearing that the entry might be successfully contested by a stranger, entered into an oral agreement with her son, the deceased, whereby the latter agreed to contest the entry of his father, and, if successful in such contest, agreed to make a timber-culture entry upon said land, and thereafter prove up and obtain title in his own name under such entry; and further agreed that, after so obtaining title, he would convey the land to the defendant without consideration other than love and affection. Defendant agreed on her part to pay all the land-office expenses incident to carrying out said oral agreement, and to plant trees and cultivate the same, and at her sole expense to make all the improvements required to be made upon the land under the laws governing timber-culture entries on government land. The defendant fully complied with said agreement on her part, and the deceased, after instituting a successful contest of his father's claim, entered the land as a tree claim, and thereafter proved up and obtained a patent therefor from the government in his own name; but the deceased never at any time conveyed the title to the defendant, but died without doing so. During all the time in question defendant had the possession and beneficial use of the land. The action is brought to quiet title in the estate of the deceased, and defendant, for affirmative relief, prays that oral agreement between herself and the deceased be enforced, and that title in fee may be passed to her by a decree of court. The trial court quieted title in the plaintiff, and awarded the posession of the land to the plaintiff, as administratrix of the estate of the deceased. *Held*, that such judgment was properly entered.

Equity will not Enforce Illegal Agreement.

The oral agreement to the effect that the deceased should make a timber-culture entry for the use and benefit of the defendant was illegal, and one which tended to thwart the policy of the government with respect to timber-culture entries upon the public domain, and was, moreover, an agreement which, in its performance, necessitated the commission of perjury. A court of equity will not lend its aid to enforce an illegal agreement.

Title Obtained from Government.

Held, that the title obtained from the government by the deceased was an indefeasible title, except as against the government, and the same descended to his heirs at law.

Right of Administratrix to Sue.

Held, further, that the administratrix was not, with reference to said illegal agreement, in pari delicto with the defendant, and hence

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could maintain this action, and recover the possession of the land from the defendant.

Appeal from District Court, Traill County; *Pollock*, J.

Action by Lizzie Fleischer, administratrix of William Fleischer, against Ernstenia S. Fleischer. Judgment for plaintiff. Defendant appeals. Affirmed.

J. F. Selby and *P. G. Swenson*, for appellant.

A married woman whose husband has deserted her can hold and prove up a timber culture entry. *In re Waltenburger*, 2 Copp. L. O. 828; *Glazer* v. *Bogardis*, 2 L. D. 311. So, when her sons informed appellant that she could not hold her timber culture claim because she was married she was misled to her prejudice. William Fleischer filed for his mother upon the land which she had an undisputed right to hold and prove up in her own name. The arrangement was to protect defendant and was not fraudulent. *Church* v. *Adams*, 61 Pac. Rep. 639. The statute does not inhibit a timber culture claimant, who has made his entry in good faith, from contracting to sell his claim prior to final proof. *Sims* v. *Bussey*, 4 L. D. 369; *U. S.* v. *Reed*, 5 L. D. 313. The reasoning in *Anderson* v. *Carkin*, 135 U. S. 483, involving homestead and pre-emption does not apply in cases involving timber culture entries. *Church* v. *Adams*, 61 Pac. Rep. 639. Good faith and strong equities will protect and preserve appellant's rights. *Barlow* v. *Barlow*, 28 Pac. Rep. 607; *Sutphen* v. *Sutphen*, 2 Pac. Rep. 100; *Larison* v. *Wilver*, 1 N. D. Rep. 284, 47 N. W. Rep. 381. Her long possession; her legal right to perfect proof; her payment of fees and expenses; contest filing and final proof; cultivation and improvements and in planting and cultivating the trees; her remaining in exclusive possession of the land, together with the acts and conduct of William Fleischer in treating the land as belonging to her, his declarations and admissions are sufficient to establish a resulting trust in the land in favor of appellant. *Barlow* v. *Barlow*, 28 Pac. Rep. 607; *Hagen* v. *Powers*, 72 N. W. Rep. 771; *Dorman* v. *Dorman*, 58 N. E. Rep. 235; *Rayl* v. *Rayl*, 50 Pac. Rep. 501; *Costa* v. *Sylva*, 59 Pac. Rep. 695; *Dana* v. *Dana*, 28 N. E. Rep. 905; *Reynolds* v. *Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523. There are sufficient acts constituting particular performance to take this case out of the statute of frauds. *Story* v. *Black*, 1 Pac. Rep. 135; *Irwin* v. *Dyke*, 1 N. E. Rep. 913; *Lamb* v. *Hindman*, 8 N. W. Rep. 709. Even if the contract of the parties was invalid the plaintiff is not entitled to damages for use and occupancy of the land, so far as contract was executed, even if invalid it would be binding, and the court will not disturb it. *People* v. *Evens*, 8 N. D. 121, 77 N. W. Rep. 93; *Kirkpatrick* v. *Clark*, 24 N. E. Rep. 71.

John Carmody and *F. W. Ames*, for respondent.

Equity will not assume jurisdiction to compel the specific performance of a contract that is illegal in any of its features. 22 Am.

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& Eng. Enc. L. 1094; *Dial* v. *Hair*, 54 Am. Dec. 179; *Lewid* v. *Walker*, 1 Mo. App. 459; *Handy* v. *St. Paul Globe*, 41 Minn. 188, 42 N. W. Rep. 872, 4 L. R. A. 466; *Coppell* v. *Hall*, 74 U. S. 7, 19 L. Ed. 244. A void contract cannot be ratified. *McCormick* v. *Nichols*, 19 Ill. App. 334; *White* v. *Sutherland*, 64 Ill. 181; *Waterson* v. *Brulsland*, 1 Mo. App. 45. If a contract between William Fleischer and appellant had been brought to the attention of the land department at the time of the timber culture entry was made or at the time of the final proof, the proof would have been disallowed. The appellant, therefore, has no interest in the land and equity will not serve her. *Anderson* v. *Carkins*, 10 Sup. Ct. Rep. 905; *Mellison* v. *Allen*, 2 Pac. Rep. 97; *Dial* v. *Hare*, 43 Am. Dec. 179; *Carley* v. *Gitchel*, 62 N. W. Rep. 1003; *Nichols* v. *Counsel*, 9 S. W. Rep. 305; *Robinson* v. *Jones*, 47 N. W. Rep. 380; *Dawson* v. *Merrill*, 2 Neb. 119; *Warren* v. *Van Brunt*, 22 L. Ed. 219; *Evans* v. *Fulsom*, 5 Minn. 422 *St. Peter Land Co.* v. *Bunker*, 5 Minn. 199; *McCue* v. *Smith*, 9 Minn. 259; *Oakes* v. *Heaton*, 42 Ia. 116; *Brake* v. *Ballou*, 19 Kan. 397; *Gaines* v. *Molen*, 30 Fed. Rep. 27. Thus special performance of a contract by which a party agreed to furnish half the government price of land and improvements in consideration of the other party permitting and conveying one half the land to him will not be enforced. *Marshall* v. *Cowells*, 3 S. W. Rep. 188; *Sherman* v. *Eakin*, 1 S. W. Rep. 359; *Cox* v. *Donnely*, 34 Ark. 762; *Persons* v. *Persons*, 84 N.W. Rep. 668; *Palmer* v. *March*, 24 N. W. Rep. 140. The testimony of appellant to prove her contract consisted of scattered statements to different individuals, vague, indefinite and uncertain. They lacked the essentials of an agreement. *Lowe* v. *Lowe*, 86 N. W. Rep. 11.

WALLIN, C. J. This action was brought to quiet the title to the N. W. ¼ of section 26, township 144 N., of range 51 W., in Traill county. The district court entered judgment in favor of the plaintiff after a trial without a jury, and the case is now before this court for trial anew on appeal from such judgment.

The facts in the record which are uncontroverted may be epitomized as follows: In the year 1878 Charles W. Fleischer, the husband of the defendant, made a homestead entry upon the northeast quarter of said section 26, and at the same time made a timber-culture entry upon the land in controversy. In the spring of 1879 said Charles W. Fleischer and his family, then consisting of his wife and seven minor children, removed from the state of Minnesota, and took up their residence upon said homestead claim, and the defendant has ever since resided upon such homestead with her family. In the years 1879, 1880, and 1881 Charles W. Fleischer broke a portion of the tract embraced in the timber culture entry and in the year 1881, or prior thereto, planted five acres of said tract to seeds and cuttings, as required by the laws of congress governing timber-culture entries. In the month of June, 1881, Charles W.

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Fleischer deserted his family, and departed from the territory of Dakota, and said desertion has ever since continued. In the year 1884 the deceased, William Fleischer, instituted a contest of said timber-culture entry before the local United States land office, and such proceedings were had therein that said entry of Charles W. Fleischer was canceled, and the deceased, William Fleischer, made a timber-culture entry upon the same land in the month of November, 1884. In the year 1897 the deceased made final proof under his said entry, and later the United States government issued to Wililam Fleischer a patent conveying the title of the land to him in fee simple, which patent bears date of August 15, 1898, and the same is duly recorded in the office of the register of deeds of Traill county. William Fleischer died intestate on the 2d day of September, 1899, and the plaintiff, his widow, was duly appointed administratrix of his estate in the month of October, 1900, and has ever since continued to act in said capacity, and as such administratrix the plaintiff has inventoried the land in controversy as a part of the estate of the deceased. The defendant, at her own expense, aided by her children, continued to improve the land embraced in said timber-culture entry, and in so doing in the years 1881, 1882, and 1883, broke and backset 90 acres of the same, fitted the same for cultivation, replanted and cultivated the 5 acres of trees and cutting therefore planted by her husband, and planted and cultivated an additional 5 acres of trees on said tract, and in all respects as to improvements, and at her own expense, complied with the provisions of the acts of congress governing timber-culture entries upon the public domain. It is further conceded that after the deceased made his timber-culture entry upon the premises in the year 1884, and during the lifetime of the deceased, viz., during the years 1895, 1896, 1897, 1898, and 1899, and after the death of the deceased and during the year 1900, the defendant occupied the premises, and cultivated the same and during all of said years the defendant had the exclusive possession and beneficial use of the premises without objection upon the part of the deceased, and so used and occupied the premises during the lifetime of the deceased with his consent. The further fact appears in evidence that the defendant, with the knowledge and consent of the deceased, paid the taxes upon the land in the year 1898, and also paid the taxes, after the death of deceased, for the year 1899. The evidence further shows that in the year 1901, and after notice that plaintiff, as administratrix, claimed the land, and the possession thereof, as part of the estate of the deceased, and claimed the right to the immediate use of the entire tract in question, the defendant took possession of, seeded, cultivated, and harvested 45 acres of the land in question; and the trial court found—and, we think, properly—from the evidence that the value of the use of said 45 acres in the year 1901 was $90. The trial court also found the following facts: That during the lifetime of the deceased he "permitted said defendant to have the

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use and occupation of said premises free of charge, and without other or further consideration than that of love and affection and those items of expense to which the said defendant had been put by reason of improvements on said land and caring for the same and the payment of taxes thereon, and that during all the times hereinbefore referred to the defendant was in the possession of the said land." We think this finding of the trial court has ample evidence to support it, and it may be added that there is not a scintilla of evidence in the record tending to show that the deceased at any time said or indicated that he expected to receive from the defendant any consideration for the use of said premises over and above that found in said finding of fact, nor is there any warrant in the evidence for holding that the deceased intended to take possession of the land in question at any time within the lifetime of the defendant, or at all. But the defendant claims to be the equitable owner of the land, and that the deceased held the title in trust for the use of the plaintiff; and defendant, by her answer, asks for affirmative relief, that judgment may be entered in this action compelling the plaintiff, as administratrix, to carry out such trust, and execute to the defendant a proper deed of conveyance of the land. The defendant bases her title upon an alleged trust relation, which is set forth by certain allegations in her answer, which are, in effect, briefly as follows, viz.: That defendant in the early part of the year 1884, became apprehensive that the said timber-culture entry of her husband was in danger of being successfully contested and lost, and, to avoid any such result, and for the purpose of retaining the use and benefit of the land for herself and family, and as means of acquiring title thereto in herself, the defendant entered into an oral agreement with her son, William Fleischer, the deceased, who was then above the age of 21 years, to the effect that said William Fleischer should, in furtherance of the interests of the defendant and her children, enter a contest against the filing of his father as made upon the land in 1878, and, if successful in said contest, that he (the deceased) should make a timber-culture entry upon the land in his own name, and thereafter, under said entry, obtain title to the land from the government of the United States. The answer further states, in effect, that said arrangement between the defendant and the deceased was to the effect that the deceased should, on receiving the title to the land from the government, without consideration, convey the title to the defendant in fee simple. Defendant further alleges that said agreement between herself and her son was such that the defendant was to be and remain in the full and exclusive possession of the land, and have the sole beneficial use thereof, and that defendant should make the improvements at her own expense necessary to be made to entitle her son to prove up at the land office and obtain title under his said entry; and it is further alleged that it was agreed that all the ex-

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pense incident to the proposed contest and in acquiring title to the land should be advanced and paid by the defendant. The answer further states that the deceased did, in the year 1884, institute a contest of his father's entry, which contest was successful; and that pursuant to the arrangement with the defendant, the deceased, in the same year, made a timber-culture entry on the land in question, and in the year 1897 proved up and received a final receipt or certificate, upon the surrender of which he received a patent for the land in his own name, which patent was dated August 15, 1898, and has been recorded. The answer further alleges that the expense of said contest was $30, and that of making final proof was $50; that all of said expenses were paid by the defendant; and that all expenses in and about making necessary improvements upon the land were advanced and paid by the defendant. The answer further avers, in substance, and the evidence shows, that the deceased, at all times before the patent issued to him as well as thereafter, fully recognized and ratified the said arrangement, and never repudiated the same, and that at all times during his lifetime he acquiesced in the defendant's occupation and beneficial use of the land, and that during his lifetime, and after the patent issued, the deceased often spoke to the defendant and divers other persons about executing a deed conveying the title of the land to the defendant, but that the execution of a deed of conveyance was delayed from time to time, and that the same was never executed. It therefore appears by the answer and by the testimony, that the defendant bases her rights in the premises not upon any independent arrangement or agreement with the deceased made after he became seized of the title to the land, but upon said oral agreement made in the year 1884, and upon its reaffirmation, and upon the performance of said agreement by both parties to the same in so far as the agreement was carried out. The answer does not allege, nor does the evidence tend to show, any agreement between the deceased and the defendant whereby the deceased morally or otherwise obligated himself to convey the title of the land to the defendant at any time, except only by and under said oral arrangement made in 1884, and upon which the deceased proceeded to institute a contest of his father's entry. Nor is there any evidence whatever tending to show a new consideration for any other or different agreement to convey the title to the defendant. The evidence is conclusive to the effect that the defendant, acting upon the advice of her two sons, was led to enter into such agreement with the deceased as a means of saving the land for herself and her family, and because she was led to believe that she could not, as a married woman, personally act in acquiring title to the land in her own name. Nor is there any evidence that the deceased knowingly and intentionally instituted this contest with any purpose which was actually fraudulent, either with reference to the defendant or illegally with reference to the government of the United States. On the contrary, there is abundant evidence that the deceased on many occasions, and to dif-

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ferent persons, both before and after he acquired title to the land, acknowledged a moral obligation on his part to convey the land, and expressed a purpose of conveying the same to the defendant, and often made statements to the effect that the land in question by right belonged to his mother, and that he intended to transfer the title to her.

In reaching a conclusion upon the facts at issue we have not ignored objection to testimony which appears of record, but we deem it unnecessary in this case to discuss the admissibility of evidence. When all the competent evidence is considered, we are of the opinion that the facts pleaded in the answer are established by competent evidence, and the case will therefore be disposed of on this theory of the facts. In support of their contention the defendant's counsel claim that the deceased at the time of his death held the title of the land in trust for the defendant's use, and further contend that if, for any reason, the deceased was not such trustee, then, and in that event, a court of equity will decree a specific performance of the promise of the deceased to convey the land to the defendant. Counsel concede that a parol agreement to convey land is within the prohibition of the statute of frauds, but insist that the evidence shows that the equities of the defendant, as shown by the evidence, are ample to take the case out of the operation of the statute, and are of such weight as will entitle the defendant to a decree of specific performance. In support of this contention it is claimed that the acts of congress governing timber-culture entries do not, in terms or otherwise, forbid the alienation of the claim of the entryman after the entry is once made, and that the evidence shows in this case that after the entry was made by the deceased he reaffirmed and ratified the oral agreement as made with the defendant at a date prior to his entry. The evidence, however, goes no further than has been stated. There is no allegation or evidence showing that the deceased at any time after making his entry made or attempted to make any new agreement to convey the land to the defendant, but there is evidence, consisting chiefly of the admissions made by the deceased, that he considered himself as resting under a continuing obligation to convey the title to the defendant under the parol arrangement made with her before his entry of the land. In support of this feature of their contention, counsel cite *Church* v. *Adams*, (Or.) 61 Pac. Rep. 639; *Sutphen* v. *Sutphen*, (Kan. Sup.) 2 Pac. Rep. 100; *Larison* v. *Wilbur*, 1 N. D. 284, 47 N. W. Rep. 381. In our opinion, neither of these cases is in point. The facts in all the cases cited serve to distinguish them from the case at bar. In the Oregon case a party who had made a good-faith entry of a tract of land under the timber-culture laws entered into a written contract to transfer his claim so obtained to a copartnership of which the entryman was a member. This written agreement was upheld by the court upon the ground that the laws of congress do not, in terms, prohibit the transfer of a timber-culture entry in cases where the original entry was made in

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good faith, and was so made before a transfer is made or agreed to be made. The facts in the Oregon case obviously do not comport with those in the case at bar. Here there is no written agreement to transfer the tree claim or the land covered by the entry, and, on the contrary, the agreement in this case was entered into before the entry, and at a time when an agreement was made in contravention of law, or at least clearly against the policy of the law. Nor is the case of *Sutphen* v. *Sutphen* nearer the mark. In that case, a father having a homestead filing agreed orally with his son, for a stipulated price, to sell the homestead to the son, and convey the same to him after title should be obtained by the father. After acquiring title, the father executed and delivered to his son a deed conveying the land to the son, and such conveyance was made upon the identical terms and consideration as stated in the parol agreement. The action in that case was brought to recover an unpaid balance of such purchase price. The son pleaded in defense of the action that the parol contract was illegal, and made in violation of the law forbidding the sale of homestead claims before title is secured by the homesteader. This defense was overruled, and Brewer, J., speaking for the court, held, referring to the deed of conveyance, "that it was in execution of that prior contract; that it was a present affirmation of its validity; a new contract, so to speak; a sale upon the time and terms theretofore agreed upon." But the case at bar is quite dissimilar. In this case there is no deed of conveyance evidencing any "new contract"; nor is there a new agreement of sale, either oral or written, whereby a new agreement is concluded upon the terms and consideration embraced in the original arrangement between the deceased and the defendant, or upon any terms whatever. Nor is the case of *Larison* v. *Wilbur* (decided by this court) in point. In that case a pre-emptor, after acquiring title under his pre-emption, entered into a written agreement with the defendants to sell the land for a price named in the agreement. The action was to recover a portion of the purchase money, and the defendant anewered, alleging that the written agreement embraced the terms of a certain unlawful oral agreement made between the same parties before the pre-emptor made his filing, and under which the pre-emptor agreed to sell and convey the title to the defendant after acquiring title under the pre-emption laws of the United States. The written agreement was upheld as a new agreement made at a time when the vendor had a right to make the same. But it is manifest, for reasons already stated, that the case at bar does not fall within the principle of the case last cited. In this case there is neither a new agreement nor a written agreement to sell. There is another difference which distinguishes that case from this. In the case at bar there never was an agreement to sell. The essence of the oral agreement was that William Fleischer, in consideration of love and affection for his mother, and for no other consideration, agreed to act in his mother's interest in acquiring title to the land from the government on condition that she should bear the expense

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and do the work required by the law, and that, after acquiring title, he was to convey the same to his mother.

This leads us to a consderation of defendant's contention that the deceased was a trustee, and held the title in trust, and that the defendant is the beneficiary under such trust, and that, in consequence, a court of equity will, by its decree, compel an execution of the trust by requiring the plaintiff, as administratrix, to convey the title to the defendant. In support of this contention counsel cite *Hagan* v. *Powers,* (Iowa) 72 N. W. Rep. 771; *Rayl* v. *Rayl,* (Kan. Sup.) 50 Pac. Rep. 501; *Costa* v. *Silva,* (Cal.) 59 Pac. Rep. 695; *Dana* v. *Dana,* (Mass.) 28 N. E. Rep. 905; and *Barlow* v. *Barlow,* (Kan. Sup.) 28 Pac. Rep. 607. With the exception of the case last cited, none of the cases here referred to arose under the acts of congress governing the matter of acquiring title to public lands. The other cases tend to show that, where the consideration for land is paid by one person and the title is conveyed to another, to be held by the latter until demanded, the relation of trustee and trustor is thereby created. This is a well-recognized rule of law, and one voiced by chapter 58 of the Civil Code. See page 939, Rev. Codes 1899. We think the case of *Barlow* v. *Barlow,* supra, is a case most nearly in point. In that case husband and wife removed from Iowa to the state of Kansas, with a view to acquiring land. At that time the wife was possessed of some property, but the husband had little or none. Under these conditions it was agreed that any land which might be acquired in Kansas should belong to the wife. The husband took a homestead claim in Kansas, proved up under the same, and obtained a receiver's certificate, which he at once delivered to his wife, and then promised to convey the title to her as soon as he received a patent from the government. The husband, who was then without means, and was nearly blind, further said that he desired to live upon the land as long as he lived, and that he wanted his wife to build upon it and furnish him a home there. She promised to do so, and thereafter furnished the necessary money and labor, and continued to make improvements on the land until the death of her husband who died without conveying the title. Eight years after his death certain children of the husband by a former wife, who had never lived in Kansas, instituted an action to partition the land. The partition action failed, and the land was awarded to the widow of the deceased. It will be noticed that in the Barlow Case there was no special agreement shown between husband and wife touching the homestead claim, and hence, unlike the case at bar, there was no agreement made which contemplated a direct violation of any act of congress or the commission of perjury. Their agreement was a general understanding only, to the effect that, inasmuch as the wife owned the property, she should become the owner of any land acquired in Kansas, and this arrangement was made with no reference to any particular tract of land. Under these circumstances the husband

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had an undoubted right to agree to convey to his wife at the time he promised to do so, in connection with the delivery of the receiver's certificate to her. In connection with that promise the husband exacted a reciprocal promise from his wife to further improve the premises and make a home for them on the place. This promise was faithfully performed by the wife, and she continued making improvements thereunder. Upon this state of facts the wife was awarded the title, and, we think, properly. We think that the case was taken out of the operation of the statute of frauds by the equities inherent in the case, and hence that the decree giving her the title can be sustained upon that ground, viz., upon the ground that the wife relied upon the word of her husband, and acted on it to such an extent that a decree for a specific performance of the new promise was proper under the peculiar circumstances and equities of that case. In the case at bar there is no such promise, and there are no equities which originate in and depend upon any new promise. But there is a further and radical difference which distinguishes this case from that of *Barlow* v. *Barlow*. In the case at bar there was a special arrangement made between the defendant and the deceased at a date prior to the entry of the land made by the deceased. This agreement called for and necessitated a violation of the laws of congress and of the policy of the government with respect to timber-culture entries of public lands; and, worse still, it was an arrangement which could not possibly be carried out without the commission of perjury. The entry man, under an act of congress, is required, as a part of his entry, to make an affidavit embodying the following averments: "That this filing and entry is made for the cultivation of timber and for my own exclusive use and benefit; that I have made the application in good faith and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever, and that I intend to hold and cultivate the land and to fully comply with the provisions of this act." If, when the deceased applied to the land office to make his entry, that office had been advised of the fact that the applicant did not wish to make an entry for his own use, and did not expect to plant or cultivate any trees upon the land, or make any improvements thereon, and had been advised that the entry was sought for in the interests of the defendant, and that she alone was to make all the required improvements, and that she was to have the exclusive beneficial use of the land both before and after the title was acquired, and that, as soon as the title had been acquired, the same, under an agreement so to do, was to be conveyed to the defendant, what must have been the result? The question suggests its own answer. The entry would have been refused. These facts, however, were presumptively unknown at the land office, and the entry was allowed to be made upon said application embracing said affidavit. This record establishes the fact that the affidavit was false with

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respect to the averments therein which are quoted above. It may be true—and it is charitable to assume the fact—that the parties to the arangement set out in the answer were actually unaware of the illegal nature of their agreement. Nevertheless, the court, under an established rule of law, must hold that they did know and did understand that the agreement was unlawful, and that the same could not be carried out without the commission of perjury. See 20 Stat. pages 113-115, embracing an act of congress approved June 14, 1878. It is therefore apparent that the very agreement under which the defendant claims the aid of a court of equity rests in an arrangement made in violation of the law, and one which included as an incident the commission of perjury. It is hardly necessary to say that a court of equity will never lend its powers in aid of any such unlawful enterprise. See *Dial* v. *Hair,* 54 Am. Dec. 179. See, also, Am. & Eng. Enc. Law (1st Ed.) p. 1014; *Mellison* v. *Allen,* (Kan. Sup.) 2 Pac. Rep. 97; and especially *Anderson* v. *Carkins,* 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272. In the case last cited Anderson contemplated filing upon land under the homestead laws, and before doing so entered into a written agreement, for a valuable consideration, to convey one-half of the tract to Carkins as soon as title from the government was obtained under the contemplated filing. Anderson made his entry, and in due course obtained title thereunder. The action was brought by Carkins to compel specific performance of the written agreement to convey. A decree was entered for plaintiff in the state court, but the supreme court of the Unied States reversed the same. Mr. Justice Brewer, speaking for the court, used this language: "There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the government in the homestead laws to secure for the benefit of the homesteader the exclusive benefit of his homestead right. Such a contract is against public policy, and will not be enforced in a court of equity." In another part of the opinion, the following language is used: "Whether the contract be absolutely void or not, it is so clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it." In our judgment, the quoted language, while used with reference to the laws regulating homestead entries, is equally applicable to the facts of this case, and is authority directly in point. If there was a contract between Anderson and Carkins which thwarted the policy of the government, and which necessitated the commission of perjury, there is a similar contract in this case, and in both cases the obnoxious contract is pleaded as a basis for relief in a court of equity. It will be conceded that the equities of this case, as manifested by this record, strongly plead in behalf of the defendant. The claim in question was originally entered by her husband, and after his desertion of the defendant she guarded it faithfully for years. It clearly ap-

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pears that the timber-culture entry made by her son, the deceased, was made with a disinterested purpose to acquire the title for the use of the defendant and there is no evidence that such purpose was ever abandoned during the lifetime of the deceased. Nevertheless, this state of facts, persuasive as it is, cannot, in a court of equity, efface the controlling consideration that the defendant's alleged interest in the land has for its foundation an illegal scheme to thwart the law and the policy of the government with respect to timber-culture entries upon government land, and one which involves the commission of perjury in its execution. When all is said, the stubborn fact remains that William Fleischer, the deceased, never did convey the title to the defendant, nor agree to do so, by any agreement which a court of equity can enforce. The title vested in the deceased by the government patent was an indefeasible title in fee simple. Doubtless the government might have intervened, and procured a decree of forfeiture. But the government alone could institute a proceeding for this purpose, and it has never done so. See *Larison* v. *Wilbur*, 1 N. D. 284, 47 N. W. Rep. 381. Under the laws of descent the title of the deceased, at his death, became vested in his heirs at law. Counsel for defendant have suggested that, if the agreement was illegal, and one which, for that reason, a court of equity cannot enforce in defendant's favor, William Fleischer was necessarily in pari delicto, and that a court of equity would, for that reason, refuse to aid him; and hence, as counsel argue, the judgment of the trial court, which gave the plaintiff the possession of the land as administratrix of the estate of the deceased, was erroneous pro tanto,—citing *Kirkpatrick* v. *Clark*, 132 Ill. 342, 24 N. E. Rep. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531. Undoubtedly there is a general rule of law, subject to certain exceptions, where parties are equally concerned in illegal agreements, that they are remediless as to each other. This maxim is expressed as follows: "In pari delicto potior est conditio defendentis et possidentis." But, in our opinion, this maxim can have no application to the facts of this case. Neither the plaintiff nor the minor children of the deceased have been guilty of any wrongful acts, and hence they are not in pari delicto with the defendant. The law which measures the duties of an administrator requires this plaintiff to inventory, account for, and safely keep all the property of which the deceased died possessed, to the end that the same may be distributed among the heirs of the deceased as the law directs. What the law itself requires the plaintiff to do, certainly cannot be illegal.

We find no error in the judgment appealed from, and the same will be affirmed. All the judges concurring.

(91 N. W. Rep. 51.)

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E. W. KNEELAND *vs.* THOMAS BEARE.

Liability of Landlord—Negligence.

Where portions of a tenement building are let to tenants, and the landlord retains the exclusive possession and control of other portions, he is bound to exercise common care and prudence in the management and oversight of the portion of the building retained; and, if damages are sustained by a tenant, by reason of his failure to do so, the landlord is liable therefor.

Damages for Negligent Injury.

It is *held* in an action for damages by a tenant against his landlord, and upon a review of the entire case in this court, that the trial court properly found that the defendant was negligent in caring for the portion of the rented building which was under his control, and that the damages sustained by the plaintiff were properly assessed by the trial court.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by E. W. Kneeland against Thomas Beare. Judgment for plaintiff. Defendant appeals. Affirmed.

Tracy R. Bangs, for appellant.

The lease was in writing and contained no covenant of warrant of the condition of the building and no agreement to keep it in repair and the appellant is not liable for defects arising after the making of the lease. *Harple* v. *Fall*, 65 N. W. Rep. 913; *Kruger* v. *Farrant*, 13 N. W. Rep. 158; *Edmison* v. *Asleson*, 27 N. W. Rep. 82; *Miller* v. *Rinaulda*, 47 N. Y. 636. If the obstruction was washed into the conductor by the rain which fell on Sept. 27th, 1899, the appellant cannot be charged with negligence for failure to remove it. *Chicago Bottling Co.* v. *Mitton*, 41 Ill. App. 154; *Lindsay* v. *Leighton*, 22 N. E. Rep. 901; *Lane* v. *Scagel*, 31 Atl. Rep. 289. The mere failure to guard against certain results is not actionable negligence, unless under circumstances which might have been reasonably foreseen by a man of ordinary intelligence and prudence. *New Orleans, etc., Co.* v. *McEwan*, 22 So. Rep. 675; *Chicago, St. P. & Oma. Ry. Co.* v. *Elliott*, 55 Fed. Rep. 949. There was no implied covenant that the store was provided with drainage facilities suitable for the purpose. It is incumbent on the tenant to exercise proper care and precaution in the premises. *Wilkinson* v. *Clauson*, 12 N. W. Rep. 157; *Kruger* v. *Farrant*, 13 N. W. Rep. 158; *Foster* v. *Peyser*, 9 Cushing, 247; *Witty* v. *Matthews*, 52 N. Y. 512.

Cochrane & Corliss, for respondent.

The general rule that, in the absence of an agreement, the tenant is bound to make the necessary repairs and the landlord is not liable

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for any injuries received by the tenant because the premises in the tenant's possession are not in repair, has been changed by the statute in this state. § 4080, Rev. Codes. Even at common law the landlord is bound to use ordinary care; to see to it that damage does not result to the tenant from the condition of other portions of the tenement under control of said landlord. *Quigley* v. *Mfg. Co.*, 50 N. Y. Supp. 98; *Bold* v. *O'Brien*, 12 Daley, 160; *Toole* v. *Beckett*, 67 Me. 554, 24 Am. Rep. 54; *Dollard* v. *Roberts*, 29 N. E. Rep. 104; *Peil* v. *Rheinhart*, 27 N. E. Rep. 1077; *Lindsay* v. *Leighton*, 22 N. E. Rep. 901; *Marshall* v. *Cohen*, 9 Am. Rep. 170; *Watkins* v. *Goodall*, 138 Mass. 533; *Looney* v. *McLean*, 129 Mass. 33; *Inhabitants* v. *Holbrook*, 9 Allen, 17; *Center* v. *Davis*, 39 Ga. 200; 2 Woods, Landl. & Tenant, 842, 846, 872; *Sawyer* v. *McGillicudy*, 17 Atl. Rep. 124; *Shipley* v. *Fifty Associates*, 101 Mass. 251; *Readman* v. *Cowan*, 126 Mass. 374; *Kirby* v. *Boylston, Etc.*, 14 Gray, 249. Where the landlord attempts to do anything with the premises, and, in the prosecution of the work, injury is done the tenant and such injury results from the manner in which the work is let, the landlord is liable, although the work has been done by an independent contractor. *Randolph* v. *Feist*, 52 N. Y. Supp. 109; *Wortheimer* v. *Saunders*, 70 N. W. Rep. 842; 2 Woods Landl. & Tenant, 844, 845.

YOUNG, J. The plaintiff brought this action to recover damages for a partial destruction of certain household goods, which he claims was occasioned by defendant's negligence. The damage for which compensation is sought occurred on September 27, 1899, during a heavy rain storm, and was caused by water flowing through a hatchway in the roof of the Phillips Block, a tenement building situated in the city of Grand Forks, owned by the defendant, and into the apartments then occupied by the plaintiff and his family as tenants. The action is based upon the alleged negligence of the defendant in caring for the roof of said building. There is no claim that the roof was not properly constructed, or that the provision made for conveying the water therefrom was not adequate for that purpose. The plaintiff's contention is that the defendant negligently suffered the conductor pipe which was provided for carrying the water from the roof, and which furnished the only means for its escape, to become obstructed, with the result that the water backed up and flowed through a hatchway on the roof, and down into plaintiff's apartments, causing the damage of which he complains. The case was tried to the court without a jury. The trial court found for the plaintiff and assessed his damages at the sum of $60. The defendant has appealed from the judgment, and demands a review of the entire case in this court.

The building in question is described as a two-story brick structure, with a flat tin roof, which slopes from the front to the rear of the building. The walls of the building extend several feet above the roof, thus inclosing the roof by a continuous wall, without

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openings. The water which accumulates on the roof is carried off by means of a conductor pipe 6 inches in diameter, which enters the roof at the lowest part thereof, and at the southeast corner. From the opening in the roof the pipe descends perpendicularly 6 inches, then slopes for 7 inches at an angle of about 45°, and then descends perpendicularly on the inside of and in the corner of the building, through the two stories, until it connects with the sewer. The hatchway referred to is about 13 feet from the rear end of the roof, and is about 12 inches higher than the lowest part of the roof. The first story of the building was rented as a store. The second story is divided into four flats, which were occupied by the plaintiff and three other tenants. The trial court found (and this finding is not disputed) that the roof of the building was not leased to the plaintiff or to any of the tenants, but that the same remained in the possession and under the control of the defendant, and that the defendant exercised control thereover by himself and the janitor of the building who was employed by the defendant for the purpose of looking after said building. The trial court also found "that prior to the 27th day of September, 1899, the defendant negligently suffered and caused the pipe or conductor constructed for the purpose of carrying off from said roof into the sewer the water accumulating thereon during times of rain to be choked and stopped up with rags and other material, and that defendant negligently failed to clean out the said pipe; * * * that the defendant did not actually know of the condition of the conductor referred to, but that he was chargeable with knowledge of said condition because of the fact that the same had existed for a long time prior to the 27th of September, 1899, and could have been easily ascertained by the exercise of due care in looking after the said conductor to see that the same was not stopped up; and the court finds that the defendant was negligent in failing to exercise due care in keeping the said conductor clean; that he failed to insert therein any screen or other device to prevent matter accumulating in said conductor, although such devices were in common use for such purpose, and that by reason of the fact that said roof was surrounded by a wall on all sides, rising above the same to the height of at least two feet, the risk of damage to the plaintiff and other tenants of said building from the stoppage of said conductor, causing water to accumulate on said roof, was greater than if there had been no such walls to prevent the flow of water from the roof down the outside of the building, and that the scuttle on said roof and the flashing were so constructed that the water could accumulate on said roof to sufficient depth to flow through said scuttle and back up under said flashing, and flow down upon the tenants below, and that, as a matter of fact, rain which fell upon the roof of said building on or about the 27th of September, 1899, was prevented from escaping from said roof through said pipe by reason of the same being stopped up through the negligence of defendant; that, in consequence

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thereof, water accumulated upon said roof to such an extent that the same backed up and flowed through the said scuttle and under said flashing, and flowed down into the rooms so occupied by the plaintiff, in large volumes, wetting and damaging the plaintiff's carpets, furniture, curtains, shades, pictures, and other household goods, the property of the plaintiff, to his damage in the sum of $60."

It will be noted that this case does not present the mooted question as to whether the landlord or the tenant is responsible for injuries resulting from a defective condition of leased premises which arises during the tenancy. In this case, as has been stated, the roof was in the exclusive possession and control of the defendant, and was not leased to the plaintiff or any of the tenants. The obligation rested upon the defendant to keep the roof, the possession of which was retained by him, in proper repair and condition, so that his tenants would not, through his fault or neglect, be damaged or injured in their persons or goods. In this case, as in *Toole* v. *Beckett,* 67 Me. 545, 24 Am. Rep. 54,—a case very similar to the case at bar,—the tenants had no right to interfere with the roof, or control of it. "The defendant had such care and control for the benefit of himself and all his tenants," and, as said by the court in that case, by implication he undertook so to exercise his control as to inflict no injury upon his tenants. "If the landlord does not exercise common care and prudence in the management and oversight of that portion of the building which belongs to his special supervision and care, and damages are sustained by a tenant on that account he becomes liable for them. He is responsible for his negligence. *Priest* v. *Nichols,* 116 Mass. 401; *Kirby* v. *Association,* 14 Gray, 249, 74 Am. Dec. 682; *Gray* v. *Gaslight Co.,* 114 Mass. 149, 19 Am. Rep. 324; *Norcross* v. *Thoms,* 51 Me. 503, 81 Am. Dec. 588." In support of the foregoing rule of liability, see *Glickauf* v. *Maurer,* 75 Ill. 289, 20 Am. Rep. 238; *Inhabitants of Milford* v. *Holbrook,* 9 Allen, 17, 85 Am. Dec. 735; *Shipley* v. *Fifty Associates,* 106 Mass. 194, 8 Am. Rep. 318. As to portions of the building of which the landlord has control, he retains all of the responsibilities of a general owner to all persons, including the tenants of the building. *Looney* v. *McLean,* 129 Mass. 33, 37 Am. Rep. 295. See, also, to the same effect, *Friedenburg* v. *Jones,* 63 Ga. 612; *Jones* v. *Friedenburg,* 66 Ga. 505, 42 Am. Rep. 86; 2 Wood, Landl. & Ten. 843; 2 McAdam, Landl. & Ten. 1234; 2 Shear. & R. Neg. § 710.

The question which is decisive of defendant's liability to respond in damages in this case is purely a question of fact. He was, as we have seen, under obligation to exercise reasonable care and prudence in looking after the portion of the building in his possession and under his control, with a view to preventing injuries to his tenants and others. The question is, did he use such care in reference to the conductor pipe? The trial court found that he did not,

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and that he was negligent in suffering it to become obstructed. After a careful examination of the evidence, we have reached the conclusion that this finding of the trial court is fully sustained. It is true, there is no evidence in the record from which it can be ascertained with certainity just when the pipe first became obstructed. It is evident, however, that it had been obstructed for some time. The first discovery of the fact appears to have been made during the storm. Only one witness testified as to the character of the obstruction. As soon as it was known that the pipe was stopped up, the tenants summoned one C. N. Barnes, a hardware merchant, to remove the obstruction. He testified as follows: "I discovered that at the rear of the building there was water standing within six inches from the top of the rear wall. Water was then coming down in the store. * * * I didn't know where the outlet was. * * * I knew it was some place in the back of the roof. * * * I located it in the corner, and tried to get it clear, but was unable to do it. I took some substance out of the pipe. How many times I don't know. I put my hand down in there, and got hold of what I could, and pulled it out. The stuff I pulled out seemed to pull pretty tough. Just what it was, I do not know. I don't know whether it was paper or cloth. It was something that pulled out in chunks or handfuls. I took out what I could with my hand each time. I got a stick and pounded in the hole, and after pounding some time the obstruction that was there went away. It was down three or four or five inches. I used all kinds of movements with the stick, and I pounded until I got some of the water to leave. The stuff that was in the pipe did not respond to the first stroke of the stick. I took both hands to it and pounded. Whatever I struck must have been solid or it would have gone. I pounded there some little time before the obstruction was removed." It is hardly reasonable to believe that an obstruction such as this witness describes could have been formed during the storm, and just before it was removed by him. We think that a fair and natural inference from the description given by the witness is that the substance he removed had been in the pipe for some time, and there is no evidence to repel this inference. On the contrary, such evidence as there is sustains the view that the substance which obstructed the pipe was not washed into it by the rainfall of September 27th. The defendant and two other witnesses testified that the roof was entirely free from rubbish of any kind a few days prior to the storm, and there is no evidence that any opportunity existed for a subsequent accumulation of rubbish on the roof. We are therefore led to the conclusion that the obstruction was not formed during the storm in question, but that it had existed for some time prior thereto. The question, then, is this: Was the defendant negligent in not knowing of the condition of the conductor pipe? We are agreed that he was. The defendant testified that he was upon the roof a great many times prior to September 27th, in connection with the

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painting of the roof. While he testified that he swept the roof diligently and on numerous occasions, he does not state that at any time or on any occasion he inspected the pipe to see that it was open and in a fit condition to carry off the water. He knew that, if it was not open, water accumulating on the roof could not escape except through the hatchway. The obstruction in the pipe was near the top and could have been seen by a mere casual inspection. It was not enough for defendant to show that at different times he removed the rubbish which had accumulated on the roof. Common prudence and a proper regard for the rights of his tenants required that he should exercise reasonable care in seeing that the pipe was open and unobstructed. This he failed to do, and in this we find he was negligent. In opposition to our conclusion that the pipe was obstructed prior to September 27th, it is shown that the storm of that date was accompanied by a strong wind, and it is suggested by defendant's counsel that newspapers might have been blown upon the roof and washed into the pipe during the storm. We think the possibility is too remote to be seriously considered, in view of the fact that the evidence shows that the conductor pipe was adequate to carry off newspapers without difficulty. Further, the character of the obstruction, as described by the witness Barnes, emphatically negatives this theory of its origin. We base our conclusion as to defendant's negligence upon his failure to inspect the pipe to see whether it was or was not obstructed. Whether he was negligent in not protecting the opening of the pipe with a screen or other device is perhaps a debatable question. Upon this we express no opinion.

The conclusion of the trial court meets our approval, and we find that the damages awarded the plaintiff were properly assessed. Judgment affirmed. All concur.

(92 N. W. Rep. 56.)

Cass County *vs.* American Exchange State Bank.

County Depository—Indemnity Bond—Erasure of Surety's Name—Effect—Release of Surety.

Defendants signed a bond to indemnify the county of Cass on account of the designation of the Exchange Bank of Buffalo as a depository of county funds, under section 1941, Rev. Codes, which require such bond to be signed by not less than five freeholders, and to be approved by the county commissioners. The bond was circulated for signatures by an agent of the principal in the bond. There was no express agreement or understanding either as to the particular persons or as to the number of persons who were to sign such bond. After six persons had signed, the name of Jones, who was the fifth signer, was erased by the agent without notice to or consent by the four persons signing first, and without notice to

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or consent by Bullamore, who was the sixth signer, and who signed the bond before the name of Jones was erased. At the time of such erasure by the agent, the bond was not completed. The names of the signers had not been inserted in the body of the bond, nor had all the signatures thereto been obtained. The erasure was made by drawing a red ink line through the name, and was plainly discernible. The agent intended to procure two more sureties besides the six who had signed when the name of Jones was erased, before presenting the bond for approval by the commissioners. After the erasure of Jones' name, four other sureties signed the bond. It was then presented to the commissioners for approval, and was approved. *Held*:

1. That the four signers of the bond whose signatures precede that of Jones signed the bond without reference to the signature of Jones or Bullamore. Therefore such four signers are liable upon the bond despite such erasure.

2. That Bullamore, the sixth signer, who signed next after Jones, and before the erasure of Jones' name, and who did not consent to the erasure, is not bound as a surety.

3. That the four persons signing after the erasure, and with knowledge thereof, are estopped from claiming prejudice by reason of such erasure.

4. The erasure of the name of Jones was such a patent fact as put the commissioners on inquiry as to the circumstances connected with the erasure. Such inquiry would have disclosed the fact that Bullamore, the sixth signer, was prejudiced by the erasure, and therefore released from liability. Hence it must be presumed that the commissioners approved the bond with knowledge of his release.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the County of Cass against the American Exchange State Bank of Buffalo and others. From the judgment, plaintiff appeals. Reversed.

Newton & Smith; Morrill & Engerud, for appellant.

Where a surety claims to be released by reason of transactions occurring before delivery of the bond, he must establish, First, that he signed the bond and left it with a third party for delivery only on certain express or implied conditions and that the obligee had actual or implied notice of the conditions. *State* v. *McGonigle*, 8 L. R. A. 735. The obligee of the bond had no notice that the delivery was unauthorized by reason of the violation of the implied conditions under which the bond was signed. The absence of such knowledge is fatal to the defense. *State* v. *Potter*, 63 Mo. 212; *Dair* v. *U. S.*, 83 U. S. 1; *State* v. *Peck*, 53 Me. 284; *Taylor County* v. *King*, 73 Ia. 153; *State* v. *Pepper*, 31 Ind. 76. Notice to one member of a board consisting of several persons is not notice to the board, unless notice was communicated to the other members, or unless the member notified was acting as a committee or agent for the board in the particular transaction in reference to which the knowledge was acquired.

National Bank v. *Norton*, 1 Hill 572; Beech on Corp. 185; *Shaw* v. *Clarke*, 49 Mich. 384; *Plank* v. *Paine*, 25 Conn. 444; *Bank* v. *Cornen*, 37 N. Y. 320; *Wheel Co.* v. *Wagon Co.*, 20 Fed. Rep.

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699; *West, etc., Bank* v. *Thompson,* 127 Mass. 506; *Yellow Jack* v. *Stephenson,* 5 Nev. 224; *Farrell Foundry Co.* v. *Dart,* 26 Conn. 376; *Cuter* v. *Tompkins,* —— Pa. St. ——; *Armtrong* v. *Abbott,* 17 Pac. Rep. 517. It is conceded that notice to the board of county commissioners was a notice to the county. 1 Am. & Eng. Enc. Law, 1146. Stafford was not acting for the board in reference to the bond when he suggested an erasure. The board was not in session and he was acting in his private business. He wished to withhold from the board the fact that Jones could not justify on the bond. Under such circumstances, notice to the agent is never notice to the principal. 1 Am. & Eng. Enc. Law, 1145 (note 2). On the trial a full hearing was had and all facts either conceded or settled by the jury. This appeal presents questions of law only. Under such circumstances no new trial is required.

Allen v. *Bank,* 120 U. S. 20; *Roberts* v. *Corbin,* 28 Ia. 355; *Marquart* v. *Marquart,* 12 N. Y. 336. *Swift* v. *Agnes,* 33 Wis. 228.

Newman, Spalding & Stambaugh; Barnett & Reese, and *W. J. Clapp,* for respondent.

The alteration complained of was made before the delivery and approval of the bond. A county officer is not authorized, in behalf of the county, to make an alteration in the bond given to the county, or to release surety from such bond. The power of the county commissioners is exhausted by the approval of the bond. An alteration by them has the same effect, and no greater, than an alteration by a stranger. *Hunt* v. *Gray,* 35 N. J. L. 227, *Bigelow* v. *Stelfen,* 35 Vt. 519; *State* v. *Berg,* 50 Ind. 496; *Medlin* v. *Platt County,* 8 Mo. 235; *State* v. *McGonigle,* 8 L. R. A. 7339, 13 S. W. Rep. 758. The question is whether the bond is the deed of the sureties. The doctrine of spoilation has nothing to do with the controversy. *State* v. *McGonigle,* 13 S. W. Rep. 758; *Renville County* v. *Gray,* 61 Minn. 242, 63 N. W. Rep. 635; *State* v. *Blair,* 32 Ind. 313; *Cheek* v. *Nall,* 17 S. E. Rep. 80; *State* v. *Churchill,* 3 S. W. Rep. 352 and 880. The bond must be delivered before the liability of the sureties is affixed. The bond which the sureties executed was not delivered and the bond approved was not the one signed by them. *People* v. *Knecland,* 31 Cal. 288; *State* v. *Polk,* 7 Blackf. 27; *Bracken County* v. *Daum,* 80 (?) 388; *Howe* v. *Peabody,* 2 Gray 556 *Fairhaven* v. *Cowgill,* 8 Wash. 683, 36 Pac. Rep. 1093; *Smith* v. *U. S.* 2 Wall. 219, 17 L. Ed. 788. The bond was strictly statutory. It showed in its recitals that it was a public depository bond, provided for in § 1941, Rev. Codes. The statute is mandatory and the presentation of a bond in compliance with § § 1941 and 5319, Rev. Codes, was jurisdictional to the action of the commissioners. The full number of sureties obtained was required to secure the approval. *Cass County* v. *American Exchange State Bank,* 9 N. D. 363-267, 83 N. W. Rep. 12. Each surety who signed could rely upon the agreement implied by law, that the persons who signed

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or who signed the bond as co-sureties with him would be liable to him in contribution in case of loss. It is not sufficient that he may sustain no injury by the change of the contract or that it may even be for his benefit; a surety has a right to stand upon the very terms of his contract. *Miller* v. *Stewart,* 9 Wheat. 703; *Smith* v. *U. S.* 2 Wall. 219, 17 L. Ed. 792; *Northern Light* v. *Kennedy,* 7 N. D. Rep. 146; § 4651, Rev. Codes; *State* v. *Churchill,* 3 S. W. Rep. 357; *State* v. *Allen,* 10 So. Rep. 473. Bullamore was released because he signed the bond while Jones' name was upon it as surety, and the erasure was made without his knowledge or consent. *Farnham* v. *Cowgill,* 36 Pac. Rep. 1093; *Hessell* v. *Johnson,* 30 N. W. Rep. 209; *State* v. *Findley,* 14 S. W. Rep. 111; *Smith* v. *Weld,* 2 Pa. St. 54; *Cass County* v. *American Exchange State Bank,,* 9 N. D. Rep. 267, 83 N. W. Rep. 12. The erasure of Jones' name by drawing through it a red ink line was patent on the face of the bond at the time it was presented to the board for approval and amounted to constructive notice to the board. § 5118, Rev. Codes; *State* v. *Allen,* 10 So. Rep. 473; 16 Am. & Eng. Enc. L. 792; *State* v. *McGonigle,* 13 S. W. Rep. 578. Winslow was the agent of the sureties only for the purpose of getting a sufficient number to sign to comply with the statutes and had no authority to release any person who signed the bond as surety, or to change in any manner the obligation of any person who should sign as surety without his consent. *City of Fairhaven* v. *Cowgill,* 36 Pac. Rep. 1095; *State* v. *McGonigle,* 13 S. W. Rep. 758; *State* v. *Craig,* 12 N. W. Rep. 301. Stafford, one of the members of the board present at the meeting of the approval of the bond, had actual knowledge of the fraud on the other sureties. The corporation for which he acted is affected by his knowledge. *Bank* v. *Dennis,* 2 Hill, 451; *National Savings Bank* v. *Kushman,* 121 Mass. 490; *Innerarity* v. *Merchants' State Bank,* 139 Mass. 332; *Davis Imp. Co.* v. *Davis Iron Co.,* 19 Fed. Rep. 701; *Clerks' Savings Bank* v. *Thomas,* 2 Mo. App. 367; *Union Bank* v. *Campbell,* 4 Hump. 394.

MORGAN, J. In the year 1897 the county auditor of Cass county advertised for proposals for the deposit of county funds with the banks of the county, pursuant to the provisions of article 8 of chapter 26 of the Political Code of 1895. The American Exchange Bank of Buffalo, in said county, was thereafter designated by the county commissioners as one of the depositories of said county, and gave its bond as security for the payment to the county of the money so deposited, and to render a true account of such moneys, as provided by said chapter. Such bond, delivered to and approved by the county commissioners of said county, was in the penal sum of $10,000. The American Exchange Bank of Buffalo failed to account for or pay over to said county the sum of $1,189.38. This action was commenced against all the sureties on said bond. The

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persons who signed said bond were S. E. Bayley, Neil McPhedran, John Moug, W. W. Merriell, W. L. Jones, C. A. Bullamore, Reuben Beard, P. T. Peterson, James A. Winslow, and P. Masterson, and they signed in the order named. The bond was circulated for signatures by one James A. Winslow, who was the president of the American Exchange Bank, the principal in the bond. The bond was executed by each of the sureties without any stipulations or conditions whatsoever, except such conditions as are necessarily implied by law. No one of the sureties entered into any express agreement or condition with said Winslow as to the persons who were to sign said bond, and there were no express conditions or agreements entered into between any of the sureties. While the bond was being circulated for signatures by the president of the bank, and after Bullamore had signed the bond, the name of Jones was erased from said bond by Winslow by drawing through the name of said W. L. Jones, as signed to the bond, and to his affidavit of justification, a red ink line. This erasure was made in the presence of and at the suggestion of one Stafford, who was then a member of the board of county commissioners. Such erasure was made without the knowledge or consent of the four sureties who had signed before Jones signed, and without the knowledge or consent of Bullamore, who had signed before such erasure, and neither of such sureties has since ratified the erasure of such name. The sureties signing after Bullamore did so without any knowledge of the fact that Jones' name had been erased after Bullamore had signed, but the fact that Jones had signed the bond and that his name had been erased was apparent from a mere inspection of the bond when they signed it. Neither the name of Jones nor the names of any of the sureties had been inserted in the body of the bond at the time that the name of Jones was erased, and the names of such sureties were not inserted in the body of the bond until after all the sureties had signed it. The bond was then presented to the county commissioners for approval and approved. All of the sureties have been served with the summons in this action except the surety Winslow, and all have appeared except Bayley, Moug, and Winslow. The defendants Beard and Peterson in their answer deny that they ever signed the bond in question, or authorized any one to sign for them. The other defendants answered, alleging, in effect, that the bond upon which suit was brought was not their contract, nor binding upon them, by reason of the fact of the erasure of Jones' name from said bond without their knowledge or consent. The case was tried before a jury. At the close of the taking of evidence plaintiff's counsel moved the court for a directed verdict in favor of the plaintiff and against the defendants McPhedran, Merriell, and Masterson, for the reason that the evidence shows, without contradiction, that they signed the bond in question, together with Moug and Bayley. This motion was denied. Thereupon special interrogatories were submitted to the jury, and by the jury answered, in reference to the

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issues raised by the answers of Beard, Peterson, and Masterson. These answers were that Beard and Peterson signed such bond, and signed it after the name of Jones had been erased therefrom; that the names of the sureties were inserted in the body of the bond after all the sureties had signed it; and that Masterson signed the bond after all the other sureties had affixed their names to the bond. The plaintiff then moved the court for judgment, on the special verdict and undisputed facts, against the defendants McPhedran, Merriell, Masterson, Bullamore, Beard, and Peterson. This motion was denied. The plaintiff then moved for judgment against all the defendants except Bullamore. This motion was also denied. The defendants then moved for judgment in favor of all the defendants interested in the trial and against the plaintiff, dismissing the action. This motion was granted. Judgment was accordingly entered, and the plaintiff has appealed from such judgment upon a settled statement of the case.

The assignments of error raise a single question only, viz., did the facts recited justify the lower court in ordering judgment of dismissal in favor of the defendants? The facts in the case are now mostly stipulated and are undisputed, and the issues raised by the answers are to be determined as questions of law solely. The bond in question was authorized by the provisions of section 1941, Rev. Codes. That section provides that the depository must furnish a bond, with not less than five freeholders as sureties, in double the amount to be deposited with such bank; and a provision is made for justification of sureties, the same as that provided by law for justification of sureties in arrest and bail proceedings. Section 5319 regulates justification of sureties in arrest and bail proceedings as follows, so far as material: "They [sureties] must each be worth the amount specified in the order of arrest, * * * but the judge or justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail." The sureties on the bond in question did not justify by appearing before a court or judge to give evidence as to their property and qualifications as sureties, but each surety signed and was sworn to an affidavit stating his qualifications, and that he was worth a stated sum in property not exempt by law from sale or execution, and over and above debts and liabilities. When "justification" is mentioned in considering this case, such affidavits are referred to, and not an appearance before a magistrate and giving testimony as to qualifications. The sureties on this bond, when finally approved, had justified by such affidavits in the aggregate sum of $24,000, without including Bullamore or Jones.

The question to be determined upon the facts stated is, are any of the sureties to be held responsible for the default of their principal? If so, which ones? The plaintiff contends that they are all liable except Jones. The defendants claim that all are exempt from

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liability by virtue of the erasure. Jones not being held, is Bullamore to be held liable, inasmuch as he signed before the erasure, and did not consent to such erasure of Jones' name, and had no knowledge thereof until this action was commenced? He signed, therefore, upon the condition that all who had signed before him would share equally with him in case of default in the conditions of the bond, and that he could hold such prior signers to contribution with him in case he paid or was compelled to pay anything on account of the default of the principal. On a former appeal of this same case, this court said: "The first man who signed the bond signed with the understanding that the principal would procure such additional sureties as might be necessary to make the bond comply with the requirements of the law. Each subsequent surety signed with the same understanding and with the additional understanding that the particular persons whose names preceded his as sureties would be liable to him in contribution, should he be required to pay the bond. He signed relying upon their financial responsibility." 9 N. D. 267, 83 N. W. Rep. 12. See, also, *Hessell* v. *Johnson*, (Mich.) 30 N. W. Rep. 209, 6 Am. St. Rep. 334. Before determining whether Bullamore was released, under the facts in evidence, it must be determined whether the act of Winslow, as agent for Bullamore for the delivery of the bond to the commissioners for approval, was binding upon Bullamore, and the further fact whether the county commissioners had notice of the fact that Bullamore had signed before Jones' name was erased, or had notice of such facts as would necessarily put them upon inquiry. That Winslow was the agent of Bullamore for the purpose of procuring such sureties as would make the bond comply with the law and secure its approval cannot be doubted. His agency was limited to those acts. He was not vested with any discretionary or general powers, and could not bind Bullamore by any changes in the bond without his consent. He had no authority, under his special and implied agency, to substitute other signatures for those that were there when Bullamore signed. In doing so he exceeded his authority. Although Winslow did exceed his authority, that fact does not necessarily release Bullamore from liability on the bond. Bullamore trusted Winslow, and placed it in his power to impose upon him, and also to impose upon the commissioners. If no one else connected with the transaction has been guilty of a violation of duty, then Bullamore should be held responsible upon the bond. If the commissioners did everything required of them under the facts of which they had actual or constructive notice, then Bullamore, having trusted an agent that exceeded his authority, to his prejudice, should be the one that should suffer for his and his agent's delinquency. Brandt, Sur. § 60; *King Co.* v. *Ferry*, (Wash.) 32 Pac. Rep. 538, 19 L. R. A. 500, 34 Am. St. Rep. 880. If the commissioners had knowledge of the conditions under which Bullamore signed the bond, and approved such bond with such knowledge,

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then they acted with notice of the fact that Winslow had exceeded his authority. In such case, Bullamore would not be liable, as the bond approved by the commissioners was not the same bond signed by him. If the commissioners had notice of facts sufficient to put them on inquiry as to the conditions or circumstances under which Jones' name was erased, and Bullamore signed, then they are presumed to have notice of all the facts which the carrying on of such inquiry would bring to their knowledge. It is admitted that Jones' name was erased by drawing a line through it with red ink, and that his signature to his affidavit of justification was erased in the same way. These erasures were plainly discernible by the most casual observation, and a most cursory examination of the bond could not have failed to have led to a discovery of the erasure. The duty devolved on the commissioners to make such examination, in the interests of the public, as well as in the interests of the sureties. Our conclusion is that the erasure of Jones' name, as it appeared on the bond, was such a fact as put them on inquiry as to the circumstances under which it was made. Such erasure was therefore notice to them that Bullamore signed the bond before Jones' name was erased, and without the consent or knowledge of Bullamore. Consequently it was notice to them that Bullamore was absolved from all liability by virtue of having signed the bond. No cases have been cited, and we have been unable to find any, precisely like the present one, upon the facts, so far as the question of implied notice is concerned. The cases are numerous holding that the erasure of the signature and the erasure of the name in the body of the bond are sufficient as facts to put the obligee upon notice. *Fairhaven* v. *Cowgill,* 8 Wash. 686, 36 Pac. Rep. 1093; *Smith* v. *U. S.,* 2 Wall. 219, 17 L. Ed. 788; *Hagler* v. *State,* (Neb.) 47 N. W. Rep. 692, 28 Am. St. Rep. 514. It is also held in many cases that the erasure of the name of an obligor in the body of the bond, who never signed the bond, is sufficient to put the approving authorities on inquiry concerning the facts causing such erasure. *Hessell* v. *Johnson,* (Mich.) 30 N. W. Rep. 209, 6 Am. St. Rep. 334; *King Co.* v. *Ferry,* supra; *Dair* v. *U. S.,* 16 Wall. 1, 21 L. Ed. 491, and cases there cited. In *McCramer* v. *Thompson,* 21 Iowa, 252,—an action on a promissory note,—the court held that the fact that the name of one of the signers was erased, and others had signed thereafter, was a fact sufficient to put the payee on inquiry as to the circumstances under which such erasure was made, and the subsequent signers were released. Our conclusion is that Bullamore cannot be held, by reason of the alteration of the bond, before delivery, to his prejudice; he not having assented to such alteration.

It now devolves upon us to determine whether the sureties Peterson, Beard, Winslow, and Masterson are entitled to be absolved from all liability by reason of the erasure of Jones' name, and the consequent non-liability of Bullamore. It will be remembered that these last-named sureties signed the bond after Jones' name had

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been erased therefrom. The erasure was made by Winslow, one of the sureties who signed it thereafter. The fact of the erasure of Jones' name was plainly to be seen by them, and they cannot be heard to say that they did not know of such erasure, nor do they claim that they did not know it. They claim not to be liable upon the hypothesis or contention that the four sureties who signed before Jones did are released, and that in consequence thereof the bond is not a statutory bond, with Bullamore and the four sureties first signing released. If such were our conclusion as to the four sureties first signing, we should, without doubt, hold that they never assumed any liability. But so far as the release of Bullamore is concerned, these subsequent signers cannot claim that they are released in consequence of that fact. They signed with knowledge of the erasure of Jones' name, and were thereby put upon inquiry as to whether such erasure released Bullamore from liability. It will be presumed, therefore, that they signed knowing that Bullamore was actually released from all liability, and must be deemed to have consented to such release, and are now estopped to claim their release by virtue of such erasure or by virtue of the consequent release of Bullamore. *Smith* v. *U. S.*, infra.

We meet a different and more difficult question when we undertake to determine whether the four sureties first signing are to be held liable for the default of the principal in the bond. Each one of these four sureties, viz., Bayley, McPhedran, Moug, and Merriell, signed in the order given, without any express condition or understanding or representation as to subsequent signers. The number of subsequent sureties was in no manner alluded to; nor was it understood or agreed or represented that any particular person or persons were to sign; nor was anything said or understood between Winslow and these sureties, or between these sureties among themselves, as to the financial character or responsibility of subsequent sureties, or the sum or sums for which they should, as between themselves, undertake to bind themselves when they signed the bond. We therefore undertake the determination of this question with the admitted fact that these four sureties signed this bond without any express condition or understanding or knowledge that Jones was to be a surety thereon. They, therefore, signed under implied conditions and legal presumptions only, and what were these? They had a right to infer that there would be five sureties thereon, because the statute provides that such bonds shall be signed by not less than five freeholders, and it also appears from the justifications that they assumed that enough sureties would be secured to bring the aggregate of the sums for which the sureties justified up to $20,000; that sum being double the penalty of the bond. The defendants contend that these four sureties "signed with the implied agreement that each person who should subsequently sign should be liable to him in contribution unless released with his consent." No authorities are cited which we deem to be fairly in point, and we are constrained

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to say that the facts of the case at bar do not, in our opinion, warrant the enunciation of that principle in the broad application contended for. In this case we must not lose sight of the fact that at the time of the release of Jones and Bullamore the bond was in process of preparation, and was in no sense a completed bond. No contract, express or implied, had then been entered into between all the sureties or between sureties and obligee. The bond was not then in condition to be approved. Winslow thereafter completed it by procuring four more sureties. The defendants strongly insist that these four sureties were released, or, rather, never bound, upon the principle already stated. Such contention is based upon the following cases, which we will briefly refer to: In *State* v. *Allen*, (Miss.) 10 So. Rep. 473, 30 Am. St. Rep. 563, the sureties signed the bond on the expressed condition that the bond should not be a completed bond until enough sureties had signed and justified in sums that would aggregate the penal sum of the bond. After a sufficient number had signed and justified in such sum in the aggregate, the name of one surety was erased without the consent of any of the other sureties who had signed. It was held that the erasure released all who had signed the bond after the surety whose name was erased had signed. The release of these sureties reduced the aggregate amount of the justification of the remaining sureties on the bond below the penal sum of the bond, in consequence of which their liability was increased beyond the amounts contemplated by their express agreement when they signed the bond, and they were also held not bound. The case presents a condition of actual prejudice to the remaining sureties, and is based upon facts not at all parallel with the facts of the case at bar. *State* v. *McGonigle*, (Mo. Sup.) 13 S. W. Rep. 758, 8 L. R. A. 738, 20 Am. St. Rep. 609, is a case based upon the following facts: A collector's bond was signed by the requisite number of sureties and presented for approval. While before the approving officer one of the sureties' names was erased, and another one procured. The erasure of this name released a surety who had subsequently signed. The person subsequently signing in the place of the surety whose name was erased had no knowledge that the person whose name had been erased had ever been a party to the instrument, and the court held him not liable upon the bond. It also holds that all prior signers were released, because the bond approved was not the obligation entered into by the parties. The court said, in substance: As presented for approval, it was a completed bond, and expressed the contract of the parties as entered into by them. They had agreed to be jointly and severally bound with those whose names appeared on the bond when presented for approval, but did not "agree that the name of Cain should be substituted for that of Dolling." The grounds upon which the decision is based seem to be that the alteration complained of was made after the contract or bond was a completed one. In *State* v. *Churchill*, (Ark.) 3 S. W. Rep. 352,

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the facts are that the bond was altered by the erasure of a name after all the sureties had signed it and it had become a completed bond, and before approval. It is not an authority that the erasure of a name during the procuring of the bond, and before completion, releases those that had previously signed it. In *Smith* v. *U. S.*, 2 Wall. 219, 17 L. Ed. 788, the defendant signed the bond at the same time or after the person whose name was erased without the knowledge or consent of the defendant. The court held the defendant not bound to respond in damages on account of the breach in the conditions of the bond. The rule, as stated in that case, is as follows: "Any variation in an agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to the substitution of a new agreement for the one he subscribed, will discharge the surety." In *State* v. *Craig*, (Iowa) 12 N. W. Rep. 301, the following are the facts: A bond was executed by 11 sureties for the faithful performance of the duties devolving upon Craig as warden of the penitentiary. One George G. Smith signed the bond as surety after seven sureties had signed it. After Smith signed, three others signed as sureties while Smith's name remained thereon. After all the sureties had signed the bond, and before it was offered for approval, the name of Smith was erased without the consent of any of the sureties. The court held the sureties signing before and after Smith released. The court said: "But the bond had been put in circulation for the purpose of obtaining such number of signatures as Craig deemed necessary, and such number as should be found necessary, to secure its approval. We may assume that the sureties in question signed with the understanding that that number would be obtained, and it could not have been understood that that number was to be obtained in such a way that a portion of them could not be held. * * * Their real contract was expressed by the bond as it stood when all the signatures had been obtained, and before the erasure." The court held that the bond was a completed bond, so far as the contract of the sureties was concerned, at the time of the erasure, and that it was prejudicial to the sureties who signed before Smith to erase the name of one surety, thereby releasing three other sureties that had signed after Smith. The facts of the case at bar are not at all parallel with that case. In this case the bond was not completed when the erasure was made. No contract had been entered into between the sureties. In the absence of express agreement, we know of no right that the first signers of a bond have to insist that a subsequent signer of the bond cannot be released when such bond is, after such release, made to comply with the statute, and all implied conditions are complied with, without any possible prejudice to those first signing. In the Craig Case can it be said that the decision would have been the same had the name of Smith been erased before the completion of the bond at the time and under the circumstances under which the name of Jones was erased in the

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case at bar? We think not. Without adopting the rule announced in the Craig Case, but measuring for purposes of argument, the facts of the case at bar with the rule announced in that case, the sureties first signing would not be entitled to the judgment obtained by them in this case. At the time of the erasure, Winslow did not consider the bond satisfactory, as he then intended to procure two more sureties. If the sureties first signing in this case, as in the Craig Case, assumed that a sufficient number of sureties would be procured to satisfy Winslow and render the bond approvable, the bond, as finally completed, complied with that assumption. Neither the Craig Case nor any of the cases cited come within the facts of this case. In this case the relation of co-obligors had not come into effect between the persons who had signed before Jones did, either by express agreement or by implication of law. As to such signers there does not exist in the case a semblance of prejudice, either as a matter of fact or as a matter of law. The contention that these sureties are not bound under such a state of facts seems to us to be unwarranted as a matter of justice or principle, and cannot be sustained by authority.

This case has been before the lower court and before this court twice. On this trial all the material facts are stipulated. Both parties made motions in the court below for judgment on the evidence. The plaintiff also moved for a directed verdict. These facts bring the case within the provisions of chapter 63 of the Laws of 1901, authorizing this court to direct the entry of judgment in certain cases. See *Bank* v. *Lang*, 2 N. D. 66, 49 N. W. Rep. 414. The judgment is reversed and the trial court is directed to order judgment against all the respondents except Bullamore. All concur.

(91 N. W. Rep. 59.)

REUBEN PENGILLY *vs.* J. I. CASE THRESHING MACHINE COMPANY.

New Trial—Newly Discovered Evidence—Discretion of Court—Review on Appeal.

Where an application to the district court for a new trial is based upon newly discovered evidence, and also upon the ground that the evidence adduced at the trial is insufficient to justify the verdict, the same is addressed to the sound judicial discretion of the trial court. In such cases the trial court will weigh the evidence, and its decision of the application cannot be governed by any fixed rules of law. Such discretion, however, is not a personal discretion of the judge, to be exercised capriciously or arbitrarily, but is a sound legal discretion.

No Abuse of Discretion.

On appeal from an order made in such cases the order will be affirmed unless it appears that there was an abuse of discretion in

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making the same, and in such cases the reviewing court will consider and weigh the evidence only so far as may be necessary to determine the question whether the trial court acted within its discretion.

Discretion of District Judge.

An order granting a new trial is in such cases rarely reversed, and then only upon grounds which are strong and convincing. Courts discriminate in favor of such orders because the same are not final, but are such as require a retrial of the facts and merits.

Finding of District Court Sustained.

Applying the rules of law as above stated, it is *held* in this case that the order of the district court granting a new trial must be affirmed.

Appeal from District Court, Walsh County; *Kneeshaw*, J.

Action by Reuben Pengilly against the J. I. Case Threshing Machine Company. Verdict for defendant. From an order granting a new trial, it appeals. Affirmed.

Turner & Lee, for appellant.

H. A. Libby and *Cochrane & Corliss*, for respondent.

WALLIN, C. J. This action was brought to recover damages for a personal injury which plaintiff received while unloading a threshing engine from a flat car at Park River, N. D. The defendant is a manufacturer of such engines, and has an agency at Park River, at which the defendant's engines are kept for sale; and at the time in question one J. T. Smith was in charge of the agency, and was in the defendant's employ, and as such employe Smith had the supervision of the matter of unloading the engine in question. It appears that plaintiff had, previous to the arrival of the engine at Park River, ordered this or a similar engine of the defendant, and, when the engine reached Park River, Smith notified the plaintiff of the fact, and requested him to assist in unloading the same from the flat car. Plaintiff, upon such notice, and to expedite the delivery of the engine, did assist in unloading the engine, and in doing so was injured; and plaintiff alleges in his complaint that his injuries resulted from the negligence of Smith while acting as the agent of the defendant, in unloading the engine. At the close of the testimony, and at defendant's request, special findings, eight in number, were submitted to the jury by the trial court, and all of said findings were found for the palintiff except the seventh, which was found for the defendant, and which is as follows: "Was the plaintiff, Pengilly, guilty of any want of ordinary care which contributed proximately to his injury?" The plaintiff moved upon the minutes of the court and upon affidavits to set aside the special verdict and for a new trial of the action. The affidavits embraced evidence alleged to be newly discovered, and relating to the matter of the contributory negligence of the plaintiff. The grounds of the motion, as stated in the notice of intention, are as follows: "(1) Newly discovered evidence material to the plaintiff, and which he could not

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with reasonable diligence have discovered and produced at the trial. (2) Insufficiency of the evidence to justify said verdict, in that there was no evidence whatever of the negligence or carelessness on the part of the plaintiff at any time of his injury, and that such question was not in issue upon the trial." The motion was granted by an order of the district court. The defendant has appealed from such order, and error is assigned upon it in this court.

It will be noticed that the plaintiff, in moving to vacate the verdict and for a new trial, is assailing the seventh finding of the jury, and that only. The notice of intention, by its terms, attacks the seventh finding upon two grounds, viz.: First, that there is no evidence whatever that the plaintiff, by his own negligence, contributed to the injury of which he complains; and, second, that the question of plaintiff's contributory negligence "was not in issue upon the trial." We will consider these questions in their inverse order. An inspection of the complaint shows that the plaintiff, in stating his cause of action, uses the following language: "The plaintiff further alleges that it was by or through no fault, negligence, or carelessness on his part that he met with and sustained such injury." The answer embraces a general denial of the allegations of the complaint, but contains no specific denial of the particular averment of the complaint above quoted. Upon this state of the pleadings it is contended by counsel for the plaintiff that the question of plaintiff's negligence was not involved in the controversy, and, as they argue, the jury, in finding upon that question, have introduced an issue which is extraneous, and as such should be disregarded by this court. This contention is sought to be supported by the argument that the averment in the complaint to the effect that plaintiff was free from negligence in the premises was superfluous, and hence that the same was not a material averment of fact, and therefore that the general denial contained in the answer did not raise any issue of fact upon the matter of plaintiff's contributory negligence. We agree with this contention of plaintiff's counsel in so far as they claim that it was unnecessary to insert in the complaint the averment which is above quoted. While there is a conflict of authority upon the question, the point has been settled in this state. See *Gram* v. *Railroad Co.*, 1 N. D. 253, 46 N. W. Rep. 972. In this state the question of plaintiff's contributory negligence in this class of cases is a matter of defense, and the same forms no part of the plaintiff's case, and hence need not be referred to in the complaint. In this state, therefore, the insertion in the complaint of a statement that the plaintiff's negligence did not contribute to the injury is bad pleading in this: that it violates a well-settled rule of Code pleading forbidding the anticipation of defensive matter in a complaint. But in this case it becomes immaterial to inquire whether plaintiff's negligence was in issue under the pleadings as they were framed. Whether in issue or not, technically speaking, the issue of contributory negligence was submitted to the jury by

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the trial court as a matter of fact, and no objection was made to such submission. Nor does this record embrace an exception to the action of the trial court predicated upon the order submitting the question to the jury. Nor is there an exception or error assigned upon the admission of evidence relating to the matter of plaintiff's contributory negligence. Turning to the evidence relating to the matter of contributory negligence, we find in the record certain evidence offered at the trial, which, in our opinion, tended to establish the existence of contributory negligence; and it will be necessary to briefly refer to this evidence in disposing of the case. It appears that, as a means of unloading the engine, a structure was built upon an inclined plane leading from the ground to the end of the flat car. This structure, it is conceded, was properly built, and it is further conceded that Smith, who had charge of the work of unloading the engine, was a man who had previously had considerable experience in unloading such engines from flat cars. The plaintiff also had been handling threshing machines for several years prior to the accident. The engine, which was on wheels was backed off the car, and Smith at all times had control of a certain lever called the "friction clutch lever" which worked as a brake, and by its use the speed of the descent of the engine down the incline was within Smith's control. Smith also had exclusive control of the steering appliance of the engine, whereby the wheels resting upon the car and upon the structure extended to the ground could be guided and turned either way. Smith's position was on the platform where he could reach and control both the friction clutch lever or brake and the steering appliance. It seems that when the clutch lever or brake is set the engine would not move down the incline by the force of its weight alone, and that, in order to give it headway, it was necessary, or at least was deemed proper, to turn the fly wheel of the engine. At the time of the accident the plaintiff stood on top of one of the large wheels of the engine, called a traction or drive wheel, and was, when in that position, engaged in turning the fly wheel as a means of moving the engine down the incline leading to the ground. His testimony is to the effect that while so engaged the clutch lever or brake was suddenly and carelessly loosed by Smith, which act, he claims, resulted in a jerk of the engine, which threw the plaintiff off his balance, and caused him to swing his foot around between certain cogs, where it was injured. This is the only act of negligence charged. But while it is conceded that plaintiff did, as he claims, occupy a position on the drive or traction wheel when he was injured, and that he was then engaged in turning the fly wheel, there is a radical difference as between the witnesses upon the question whether the plaintiff was, when injured, in a proper position, and whether Smith knew, or should have known, where the plaintiff was standing at the time of the accident. Smith and one other witness testify, in substance, that, while the engine was partly on the flat car and partly on the structure leading to the ground,

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he (Smith) had the wheels blocked so as to stop the movement of the engine, and then and there made an examination to see whether the engine was in a proper position on the platform to complete its journey to the ground with safety; and that upon such examination Smith found the conditions to be safe, and that the engine would, under the conditions then existing, reach the ground in safety. Smith and one other witness further testify that Smith, after making such examination, gave directions for the blocking to be removed from the wheels, and that all persons assisting him should thereafter keep away from the engine. The plaintiff testified that no such orders were at any time given by Smith. Smith further testified that, after giving the order to keep away from the engine, he at no time gave orders to plaintiff or any one else to approach the engine, or get upon any part of the same; and that he was unaware of the fact that plaintiff was standing upon the drive or traction wheel at the time he was hurt, and did not learn that fact until after the accident. The testimony of the defendant's witnesses is to the effect that under the then existing conditions the engine would have completed its descent in safety when controlled by the friction clutch lever, and that the turning of the fly wheel was unnecessary as a means of giving momentum to the engine down the incline. On the other hand, plaintiff testifies that he was, while engaged in turning the fly wheel, and when injured, acting in accordance with the orders of Smith so to do, and with Smith's knowledge and approval. Upon this evidence the jury found that the plaintiff's own negligence was the proximate cause of his injury, and, as we have said, the testimony, if believed, would perhaps warrant such finding. It is manifestly true that if the plaintiff, as defendant claims, unnecessarily, and after being told to keep away from the engine, mounted to the top of the drive wheel, and remained there while the engine was moving down the incline, he was in a place of some danger; and, further, that he was there of his own volition, and in disregard of orders to keep away. If the plaintiff was on the wheel unnecessarily, and against instructions, he would, in law, be deemed to have assumed all the risks incident to the position he occupied; and when hurt in that position his injury, upon the theory of the evidence, must be attributed to his own want of ordinary care. The verdict, however, rested upon substantial evidence, and possibly the evidence preponderated in favor of the verdict.

But the motion for a new trial rested upon affidavits, as well as upon the evidence adduced at the trial. The plaintiff's affidavits were five in number, and two were submitted by the defendant. Plaintiff claims that the evidence as embodied in his affidavits is newly discovered, and the same is now accessible, and would be produced at a second trial if such trial were granted. Plaintiff presented his own affidavit to show diligence and as explanatory of the fact that the new evidence, as stated in his affidavits, was not offered at the trial. We think due diligence is fairly shown. A care-

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ful consideration of the plaintiff's affidavits discloses the fact that some of the newly discovered evidence would, if offered, be inadmissible under the rules of evidence; but, on the other hand, some of the same would be admissible, and would be directly pertinent upon the issue of plaintiff's contributory negligence. But defendant's counsel claims that any evidence contained in plaintiff's affidavits which would be admissible at the trial, if offered, is cumulative in character, and hence cannot be considered, when presented as newly discovered evidence, as a basis for an application for a new trial. This assumption of counsel rests upon the well-established general rule that evidence which is cumulative merely cannot, when newly discovered, furnish a ground for a new trial. But with respect to the general rule invoked by counsel it must be remembered that there is a recognized qualification of the same, which is as well supported by authority as the rule itself. The qualification or exception is this: Where the newly discovered evidence, if cumulative, is of such a nature as to be decisive of the result, it will not be rejected as a ground of new trial merely because it can be classified technically as cumulative evidence. See *Hart* v. *Brainerd*, 68 Conn. 50, 35 Atl. Rep. 776; *Keet* v. *Mason*, 167 Mass. 154, 45 N. E. Rep. 81; *Preston* v. *Otey*, 88 Va. 491, 14 S. E. Rep. 68; *Durant* v. *Philpot*, 16 S. C. 116; *Barker* v. *French*, 18 Vt. 460; *Anderson* v. *State*, 43 Conn. 514, 21 Am. Rep. 669; *Kochel* v. *Bartlett*, 88 Ind. 237; *Cleslie* v. *Frerichs*, 95 Iowa, 83, 63 N. W. Rep. 581; *White* v. *Nafus*, 84 Iowa, 350, 51 N. W. Rep. 5. But in this case some of the newly discovered evidence consists of admissions made by Smith, the agent, long subsequent to the occasion of the accident, and of other admissions made by him at or about the moment when the accident occurred. The former class of admissions by defendant's agent we think would be inadmissible in evidence, and possibly the latter would be admissible as a part of the res gestæ. None of the admissions of Smith would be cumulative upon the matter of plaintiff's contributory negligence. But we have reached the conclusion that under the facts of this case it is not the province of this court upon an appeal from the order of the trial court granting a new trial to rule decisively either upon the weight of the newly discovered evidence or to settle a somewhat dubious question as to whether some of such evidence falls within the rule or the exception to the rule relating to cumulative evidence. The order granting a new trial omits to state the grounds or reasons which operated upon the mind of the trial judge in making the order, and hence we are at liberty to consider all grounds upon which the application rested, and in doing so this court will take account of both the evidence offered at the trial and the newly discovered evidence.

An examination of the grounds of the application for the order appealed from will at once develop the fact that the trial court, in disposing of the problem presented upon the application, was not governed by fixed rules of law, and in the nature of the case could

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not be governed by any inflexible rule of law. When motions of this nature are presented to a court, they are classified as motions addressed to the discretion of the court. In considering the evidence adduced or that newly discovered, no fixed rules of law exist which could be decisive of the result of the investigation. Under such circumstances a margin of discretion is vested in trial courts, which permits them, with a view to promoting the ends of justice, to weigh the evidence, and, within certain limitations, act upon their own judgment with reference to its weight and credibility. Nor, in such cases will the court necessarily be governed by the fact that the verdict returned has the support of an apparent preponderance of the evidence. Unrighteous verdicts sometimes are supported by apparently substantial evidence, and to meet such exceptional cases the presiding judge, who sees and hears the witnesses, is vested with a discretion to vacate such verdicts and order a new trial in furtherance of justice. The rule that governs a court of review in this class of motions—i. e., those which appeal to judicial discussion—does not apply to trial courts, and hence the trial court is not debarred from granting or refusing a new trial by the mere fact that the verdict rests upon substantial or conflicting evidence. Hayne, New Trials, § 97. This discretion, however, is neither capricious, arbitrary, nor unrestricted. It is, on the contrary, a reasonable discretion, to be exercised with great caution, and in cases of abuse the trial court will be reversed by the reviewing court in this class of cases. The duties devolving upon a court of review in this class of cases are to be distinguished from those which govern in trial courts. In the reviewing tribunal the weight and credibility of testimony will only be considered with a view to determine whether the order made in an inferior court, when acting within the domain of discretion, was or was not an abuse of discretion. See 14 Enc. Pl. & Prac. 930, 985, and cases in note 1; *Taylor* v. *Architectural Co.*, 47 Mo. App. 257. The rule applicable here is analogous to that applied where a new trial is sought on the grounds of improper remarks made by counsel to a jury; i. e., the granting or refusing the application is within the discretion of the trial court. See *Watson* v. *Railway Co.*, 42 Minn. 46, 43 N. W. Rep. 904, and *Sunberg* v. *Babcock*, 66 Iowa, 515, 24 N. W. Rep. 19. In the federal courts, as at common law, all motions for a new trial are addressed to the discretion of the trial court, and its ruling cannot be reversed. See 14 Enc. Pl. & Prac. 955. As to the application of this rule to newly discovered evidence, see Id. 982, note 3, and Hayne, New Trials, p. 250. See, also, the South Dakota cases cited in *Distad* v. *Shanklin*, 75 N. W. Rep. 205. In the case at bar the order appealed from granted a new trial. Such orders, when based upon the insufficiency of the evidence, are rarely reversed by a reviewing court, and never except upon grounds which are strong and cogent. The reason for discriminating in favor of such orders is that they are not decisive of the case, but, on the contrary, only open the way

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for a reinvestigation of the entire case upon its facts and merits. See *Patch* v. *Railway Co.*, 5 N. D. 55, 63 N. W. Rep. 207; *Hicks* v. *Stone*, 13 Minn. 434 (Gil. 398); *Cowley* v. *Davidson*, 13 Minn. 92 (Gil. 86); *Morrison* v. *Mendenhall*, 18 Minn. 236, 238 (Gil. 212); also 14 Enc. Pl. & Prac. 978, 987, and cases in note 1; also, Id. p. 960.

Our conclusion is that the order appealed from should be sustained, and this court will so direct. All the judges concurring.

(91 N. W. Rep. 63.)

D. H. McMillan *vs.* James Conat.

Appeal—Grant of New Trial—Abstract—Sufficiency.

Upon an appeal from an order granting a motion for new trial, which is made upon a statement of the case, it is essential to a review of the order by this court that the appellant shall embody in his abstract such portions of the statement of the case as will establish the errors upon which he relies for a reversal and the particular grounds and errors upon which the trial court acted in making the order; and in case of a failure to do so the order will be affirmed.

Appeal from District Court, Cavalier County; *Sauter*, J.

Action by D. H. McMillan against James Conat and Mrs. Frank Conat. Verdict for plaintiff. From an order granting a new trial he appeals. Affirmed.

Cleary & McLean, for appellant.

Dickson & Dickson, for respondents.

Young, J. This is an action in claim and delivery. A verdict was directed in favor of the plaintiff. The defendants made a motion for a new trial. The motion was granted, and plaintiff appeals from the order.

Counsel for defendants assign but a single error in their brief, viz.: the order granting a new trial. This we are unable to review for the reason that the appellant has failed to present a sufficient abstract of the statement of the case which was the basis of the motion and upon which the order complained of was made. The abstract discloses that within the statutory period defendants served a notice of intention to move for a new trial for the following reasons, viz.: (1) Irregularity in the proceedings; (2) accident and surprise; (3) newly discovered evidence; (4) insufficiency of the evidence; (5) errors in law; all of which reasons were stated in the language of the statute without specifying the particulars in which the evidence was insufficient, and without specifying the particular errors relied upon. The notice of intention stated that an application would be made upon affidavits and upon a statement of the case. The abstract

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shows that a statement of the case was settled prior to the hearing of the motion. The order, which is also set out in the abstract, recites that both parties were represented by counsel at the hearing of the motion, and that the same was argued and decided upon the merits. The burden is always upon an appellant to establish error, and it is necessary for him to embody in his abstract such portions of the record as will establish the facts necessary to sustain his contention. *Ashe* v. *Beasley,* 6 N. D. 192, 69 N. W. Rep. 188. This, as we have seen, he has failed to do. We are left in ignorance as to the particular grounds or errors upon which the trial court acted in granting the motion. The appellant having failed to present a sufficient abstract of the record upon which the order complained of was based, we are unable to review it.

It follows that the order must be affirmed, and it is so ordered. All concur.

(91 N. W. Rep. 67.)

JAMES E. WISNER *vs.* WILLIAM H. FIELD.

Partner—Compensation—Agreement.

In this state a partner is not entitled to any compensation for services in the regular course of the partnership work, in the absence of an express contract therefor, or in the absence of conduct on the part of the partners, or of a course of dealing between partners, from which it can be fairly and justly implied that it was the understanding between them that compensation was to be given when unequal or unusual services were performed.

Judgment Affirmed.

The evidence examined, and it is *held* that the plaintiffs are not entitled to compensation under the facts shown.

Appeal from District Court, Ransom County; *Lauder,* J.

Action by James E. Wisner and Clarence B. Wisner against William H. Field. Judgment for defendant, and plaintiffs appeal. Affirmed.

C. W. Buttz, T. A. Curtiss, (Ball, Watson & Maclay, of counsel), for appellants

P. H. Rourke and *Alfred M. Kvello,* for respondent.

MORGAN, J. In June, 1882, plaintiff and defendant entered into and executed the following contract, viz.: "The following agreemen is made and entered into this first day of June, 1882, between William H. Field, of Port Chester, N. Y., and James E. Wisner, of Lisbon, Dakota. The said Field now holds seven contracts for

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land with the Northern Pacific Railroad Company, bearing date April 26th, 1882, and numbered as follows and for the following sections of land: * * * It is hereby mutually agreed between the said W. H. Field and Jas. E. Wisner that all payments that have been made or shall be made on the above contracts shall be paid equally by both parties, and all proceeds of the sales of the lands represented in these contracts shall be divided equally between the said parties to this agreement. Wm. H. Field, James E. Wisner."

The plaintiffs bring this action for a dissolution of the partnership created by such agreement, and ask for an accounting between them and the defendant of all matters growing out of their relations under such contract of copartnership. The facts were all stipulated at the trial and, so far as material for a determination of the single issue involved, are as follows: That plaintiff J. E. Wisner and defendant are, and ever since the execution of the contract in June, 1882, have been, copartners for the purpose of the sale of the lands described in said contract, and have done business under the firm name and style of Field & Wisner; that the number of acres of land embraced in said contract was 3,120 acres; that the title to said lands was, by express agreement, to remain in said Field; that all of the purchase money of said lands was paid, by said Field alone, to said Northern Pacific Railroad Company, amounting in all to over $4,000. The following facts were also stipulated at the trial: "That, to secure the defendant for the money so advanced for the payment of Wisner's interest in said lands, the plaintiff J. E. Wisner executed and delivered to the defendant his promissory note, in writing, dated on the 21st day of January, 1884, for the sum of $2,053.25, with interest at the rate of 8 per cent. per annum, with the express understanding and agreement that defendant should take the title to said lands in his own name and, out of Wisner's share of the proceeds arising from the sale, reimburse himself for the money so advanced and interest thereon, as evidenced by said note; that said note has not been paid, nor any part thereof, except in so far as the plaintiff J. E. Wisner's one-half (½) of the proceeds collected by him and remitted to the defendant William H. Field shall be applied thereon." The district court found as a fact that no part of said note had been paid when the suit was commenced. It was further stipulated that "there is no contract, understanding, or agreement, written or verbal, between the parties hereto or any of them, that the plaintiff J. E. Wisner or his coplaintiff, Clarence B. Wisner, was to have, receive, or retain any compensation whatever for the care, custody, sale, or disposal of said lands, or any part thereof, or for the collection of any moneys growing due thereon; that nothing was ever said between the plaintiff and defendant, or either of the plaintiffs, relative to a commission or compensation for the sale, or any services rendered in relation to said lands, or for the collection of any money becoming due theron, until about the month of March, 1900, when the plaintiff J. E. Wisner wrote the defendant, William H. Field, that he

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expected and would claim a commission on the sale of said lands, to which letter the defendant, William H. Field, made no reply." "That the plaintiff Clarence B. Wisner acquired by contract assignment January 6th, 1898, from the plaintiff J. E. Wisner, all the right, title, and interest and liabilities of the plaintiff J. E. Wisner, but with full knowledge of all the facts relative to the relation, dealings, and contract between the plaintiff J. E. Wisner and the defendant, William H. Field." It is also found by the court that J. E. Wisner has at all times since 1882 had the sole management, control, and sale of said lands; that he sold and disposed of the whole thereof upon contracts either for cash or on the crop payment plan; and that he made all the collections, and looked after the business generally.

The complaint in the action stated a cause of action for a dissolution of the partnership, and asked for a dissolution thereof and for an accounting of all partnership transactions. In the answer the defendant interposed a general denial of the allegations of the complaint, and also pleads a counterclaim; and also asked for an accounting and for a dissolution of the partnership. The trial court found that the plaintiff J. E. Wisner is indebted to the defendant on the transactions growing out of the partnership in the sum of $1,392.23, after allowing thereon credit for all moneys remitted by the plaintiffs to the defendant, and giving them credit for all their interest in the partnership property not disposed of at the time of the commencement of the action. Judgment was entered against the plaintiff James E. Wisner, upon such finding, for said amount, and for costs against both plaintiffs. The plaintiffs appeal from such judgment and demand a retrial of all the issues in the case in this court.

The case was submitted for a decision by the district court upon an agreed statement of facts, and is to be determined here upon the same facts. In such statement it is stipulated that the sole question for decision is the question whether the plaintiffs are entitled to compensation for the sale of the lands described and for the collection of the moneys due on such sales. It is agreed that a partnership between the two parties existed and that the partnership agreement was in writing. It is also agreed that there was no express agreement, written or oral, that Wisner should receive compensation for his services. Neither is it claimed that there was an express agreement that Wisner was to have the sole charge of the sales or the collections to be made after sales. Under the written partnership agreement, the partners were to share qually in the burdens and in the profits of the partnership. Nothing is therein expressed as to the duties or services to be performed by either. There is no claim of any express agreement between these parties, after executing the partnership articles, in refernce to the duties to be performed by Wisner or as to compensation for any services performed by him in furthering the interests of the partnership. From the year 1882 until the year 1900 the subjects of compensation and commissions were not mentioned by either in carrying out the purposes of the

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partnership. At frequent intervals during this time Wisner sent to Field, at his home in New York, money due him on matters in which the firm was jointly interested, and not until March, 1900, did Wisner mention the subject of commissions on sales and collections, and when he did mention that subject he simply said that he "expected and would claim a commission on the sale of said lands." The plaintiffs contend that the circumstances of this case are so peculiar and unusual that it will be implied therefrom that it was the intention and understanding of the parties that Wisner was to be compensated for his services on behalf of the partnership. The defendant contends that the law, as defined by section 4382, Rev. Codes, applies. This section is a declaration of the common law on that subject, and provides that "a partner is not entitled to any compensation for services rendered by him to the partnership." This may be said to be the general rule governing compensation among partners in partnership transactions. But this rule is not without well-defined exceptions. Among such exceptions are the following: That compensation may be provided to be paid a partner by express contract to that effect between the partners. Another exception is: If the conduct of the partners, and their course of dealing in reference to the partnership, are such that it may be fairly and justly implied from such conduct, course of dealing, or situation of the partners, that it was the understanding between them that compensation was to be given to a partner, then such compensation should be allowed. *Caldwell* v. *Lieber,* 7 Paige, 480; *Paine* v. *Thacher,* 25 Wend. 450; Story, Partn. § 182; *Lewis* v. *Moffett,* 11 Ill. 392; *Griggs* v. *Clark,* 23 Cal. 427; *Cramer* v. *Bachman,* 68 Mo. 310; *Major* v. *Todd,* (Mich.) 47 N. W. Rep. 841; 1 Lindl. Partn., p. 380. Authorities could be cited further to sustain this general principle, but nothing would be gained by so doing, as such rule is well established. The supreme court of Iowa, in speaking of this rule, said: "But, like many general rules, experience has shown by the application of the same reasoning that the rule is not inflexible. That is to say, if an agreement that the partner shall be paid for his services can be fairly and justly implied from the course of business between the copartners, he is entitled to recover. The question is one of evidence or contract and, whether the right to recover is established by necessary implication or from express stipulation, the rule is the same." *Levi* v. *Karrick,* 13 Iowa, 350. In this case the partnership was entered into under a written contract entirely silent upon the question of compensation and entirely silent upon the question as to the person by whom the sale of the lands was to be made. The terms of such contract are explicit, and there is no possible construction to be placed upon it that would give Wisner the right to compensation for services. It is also stipulated as a fact that there was no express agreement for compensation at the time that the partnership was formed, nor was anything said concerning the same, since that time, by either of the partners, until in March, 1900. Under such a state

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of facts, can it be justly and fairly implied that it was the understanding between these partners, in 1882, that Wisner was to derive any benefit out of the partnership by way of compensation in addition to the expected profits of the concern? If not then understood that he was to be compensated, and no new understanding has arisen by contract or conduct and dealing since, the court cannot equalize the benefits nor adjust them to correspond with the relative services performed by each. In other words, unless the parties intended, by express or implied agreement, that Wisner was to be paid for sales and collections, the court should not do that which the parties themselves have not done; that is, make provision for compensation for Wisner. He simply did what was for his interest when he performed the services. He was not requested to perform them by Field. It does not appear how much of his time the performance of such servics occupied, but the sale of 3,120 acres of land and the collection of the price, when the sales were made under the crop-payment plan, could not have taken but a comparatively small portion of his time during these 18 years. The fact that Field was a resident of New York was known to Wisner when he executed the contract, and that fact must have been considered at that time. Wisner was permitted by Field to engage in a profitable venture without investing any money at that time, and at a rate of interest that was very reasonable in those days. Field advanced all the money for the taxes during all these years, although such sums were charged to Wisner's account. Hence there were concessions on the part of Field, although the partnership was, as a matter of law, joint and equal in all respects. It is entirely probable that these matters were duly considered when the partnership was formed. Wisner has remitted money to Field and has been in correspondence with him during these years; and not an intimation has ever been made by him that it was the understanding that he should be compensated, until the letter mentioned in the finding was written in 1900. His contention now, that he is entitled to be paid out of the partnership proceeds for his services, is not supported by the facts, and it might truthfully be said that his conduct tends to show that such claim is made to offset a shortage due from him to his partner. We find no case in which it has been held that a mere inequality of services by partners is alone ground for compensating the one doing the greater part of the work, in the absence of an agreement, express or implied.

Our conclusion is that the plaintiffs have failed to show that it was the intention of these partners, either express or implied, that Wisner should receive anything more than his equal share of the profits of the firm.

It follows that the judgment must be affirmed. All concur.

(91 N. W. Rep. 67.)

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INTERNATIONAL SOCIETY *vs.* M. A. HILDRETH.

Sale—Acceptance of Goods—Action for Price.

One who contracts to purchase personal property of a particular kind and description is under no legal obligation to receive other or different property in satisfaction of his bargain, and, if the property tendered is not the property bargained for, he may reject it. When property which does not comply with the description in the contract of purchase is accepted and retained, the purchaser by such acceptance affirms the contract, and his sole remedy, in cases where a remedy survives the acceptance, is for breach of the contract.

Damages for Breach.

In an action to recover a balance due upon the purchase price of a set of books sold under a written subscription contract, which particularly described the books agreed to be purchased, and in which the defendant, who had accepted and retained the books, sought to recoup damages for defects, the court instructed the jury that, if the books substantially complied with the contract, they should return a verdict for the plaintiff for the full amount of the purchase price. *Held* error, for the reason that only by a complete performance by the plaintiff could he avoid liability for a breach unless there was a waiver. *Held*, further, that the erroneous instruction was without prejudice, for the reason that the jury in fact found that there was not a substantial compliance, and awarded damages to defendant for the defect alleged.

Verdict Sustained.

It is *held* that the trial court did not err in refusing to direct a verdict for defendant, or in ruling on evidence, or in denying defendant's motion for new trial on the alleged insufficiency of the evidence to justify the verdict.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the International Society against M. A. Hildreth. Judgment for plaintiff, and defendant appeals. Affirmed.

M. A. Hildreth, in pro. per.

W. C. Resser (*John E. Greene*, of counsel), for respondent.

YOUNG, J. The plaintiff brought this action to recover a balance claimed to be due from the defendant upon the purchase price of "one complete set of the Century Edition of a Library of the World's Best Literature." The set of books in question consisted of 45 volumes, and was sold and delivered to the defendant pursuant to a written subscription contract executed by him on August 27, 1897. The delivery of the books by plaintiff was completed on July 12, 1898. A copy of the subscription contract is attached to, and made a part of the plaintiff's complaint. The defendant pleaded a breach of the conditions contained in the subscription contract, alleged damages resulting therefrom, and prayed for an affirmative judgment. The question of the alleged breach of contract and amount of dam-

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ages was submitted to the jury, and a verdict was returned for the plaintiff for $61.50, which was $33.50 less than was due upon the purchase price under the terms of the contract. Defendant moved for a new trial. This was denied, and judgment was entered on the verdict. Defendant has appealed from the judgment, and assigns the ruling of the trial court on his motion for a new trial as error. The motion for a new trial was based upon (1) the insufficiency of the evidence to justify the verdict; (2) the refusal of the trial court to direct a verdict for defendant; (3) error in the court's charge to the jury; (4) alleged errors in admitting and excluding evidence.

It is an undisputed fact that the books in question, as delivered to the defendant, did not fully comply with the description set out in the subscription contract, in this: that there were but 495 vignette portraits, whereas the contract stated there would be 700. The defendant based his motion to direct a verdict in his favor, and his claim that the evidence was insufficient to justify the verdict upon the plaintiff's failure to fully comply with the contract. The defendant's contention is that, inasmuch as the books delivered did not fully comply with the description contained in the subscription contract, plaintiff had entirely failed to establish a cause of action. This contention is without merit. It is true, the defendant was under no legal obligation to accept books which did not fulfill the conditions of the contract. He could have refused to receive them, and could then have maintained an action for breach of contract, but he did not pursue that course. On the contrary, he elected to retain the books, and still retains them. By so doing he affirmed the contract. After such acceptance his sole remedy (conceding, merely for the purpose of this opinion, that any remedy survived his acceptance) was to recover damages for the breach of the contract. 2 Mechem, Sales, § § 1154, 1209, 1220, 1391-1393, and cases cited; Benj. Sales, § § 895, 896.

The instruction of which defendant complains is as follows: "If you believe from the evidence that the plaintiff furnished these books in substantial compliance with the terms and conditions of the warranty, Exhibit I [the subscription contract], then it is your duty to find a verdict for the plaintiff for the full amount demanded in its complaint." In our opinion, the foregoing instruction was erroneous. We agree with the defendant that he was entitled to a full, and not merely a substantial compliance with the contract. He was under no legal obligation to receive other books, or books differing in any way from those he had agreed to purchase. Undoubtedly plaintiff's failure to deliver a set of books conforming to the description contained in the subscription contract constituted a breach of the contract, but it is very clear that the error in the instruction was, in this case, without prejudice. The jury found that the contract was not substantially complied with, and awarded damages to the defendant for such noncompliance. Had no damages been allowed, a different case would be presented. In that event prejudice

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could properly be claimed to have followed the erroneous instruction, for in that event it might be concluded that the jury found that the contract had been substantially complied with, but had not been fully complied with, and under the erroneous instruction the defendant might have been denied damages for the breach. But no inference of prejudice is possible on the facts in this case. The jury found that the books neither substantially nor literally complied with the description contained in the contract of purchase, and awarded damages for the breach.

The subscription contract contained the following provision: "This edition is strictly limited to one thousand copies. It will be numbered, registered, and sold to subscribers for complete sets only." The defendant was a witness in his own behalf. After stating that he had visited book stores in San Francisco and Portland in 1899, he was asked this question: "Will you state what is the fact as to seeing for sale, or there being for sale, in any of those book stores, sets of this work?" An objection interposed by counsel for plaintiff to the foregoing question was sustained. In the further course of the defendant's examination he answered, in response to his counsel, that "they [referring to the publication in question] are on the market." The answer was stricken out. These rulings are assigned as error. We are of opinion that this evidence was properly excluded. The fact that the defendant may have seen "sets of this work" in book stores, and that they were on the market, did not show that this particular edition was on the market, or that the plaintiff had placed them on the market, or had sold the same otherwise than in complete sets and to subscribers. Further, the evidence sought to be elicited did not show whether the books which defendant saw had been placed upon the market by subscribers who had purchased them or by the plaintiff, and no offer was made to supply such proof.

Three letters were introduced in evidence over defendant's objection. One was written by defendant to plaintiff on December 13, 1899, and inclosed a remittance on account. The other two were from plaintiff to defendant, bearing date December 6 and December 16, 1899, and were in response to communications received from the latter, and related to the books in question, and the balance due from defendant. Defendant contends that their admission constituted prejudicial error. We do not agree with this contention. The letters tended to show an unqualified acceptance of the books by the defendant, and that up to that date no complaint had been made that they did not fully comply with the conditions of the contract. They were clearly competent for the purpose of showing a waiver of the defects in the books delivered. Under all authorities, the fact of acceptance of goods purchased is evidence of a waiver of defects. Some courts hold that acceptance, with full opportunity to examine the goods, constitutes a complete waiver as to all patent defects. Others hold that under some circumstances a remedy for the breach survives acceptance, even as to patent defects. See 2 Mechem, Sales,

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§ § 1391-1393, and cases cited; also *Halley* v. *Folsom*, 1 N. D. 325, 48 N. W. Rep. 219; *Cordage Co.* v. *Rice*, 5 N. D. 432, 67 N. W. Rep. 298, 57 Am. St. Rep. 563. Under either line of authorities the evidence was admissible. The only difference is as to the effect of acceptance. Courts following the first rule hold, as matter of law, that the acceptance conclusively establishes a waiver. Those accepting the latter rule consider the circumstances of acceptance as evidence to be weighed by the jury on the question of waiver.

The other errors assigned as grounds for the motion for new trial are disposed of by our conclusions on those above referred to.

Finding no prejudicial error, the judgment will be affirmed, and it is so ordered. All concur.

(91 N. W. Rep. 70.)

JENNIE B. ANGELL *vs.* CASS COUNTY.

Constitutional Law—Special Act—Collection of Taxes.

Chapter 161, Laws 1901, construed, and *held* that the same is not a general law, but is, on the contrary, a special law for the collection of taxes on certain real estate in certain counties only, and as such is void, because in conflict with subdivision 23 of section 69 of the state constitution, which prohibits the legislative assembly from passing any local or special laws "for the assessment or collection of taxes."

Classification—Special Legislation.

The legislative assembly may properly classify subjects for purposes of methodical legislation, but when this is done all the objects of the law within the state, which are situated in like conditions and circumstances, must be embraced within the purview of the law, and be governed by the same, and when a part of such objects are excluded from the operation of the law the same becomes obnoxious as special legislation.

Act Obnoxious to Constitution.

For reasons stated in the opinion, the legislative assembly, in attempting to make a classification of the territory within the state by counties for the purpose of collecting taxes upon certain real esate therein, which attempted classification included some counties and excluded others, did so arbitrarily, and upon no substantial ground or necessity which called for or justified such classification. The effect of such attempted classification was to legislate specially for the collection of taxes on lands included within certain counties, and at the same time exclude from the operation of the law other lands in like circumstances and conditions with respect to unpaid taxes for the same years.

Whole Act Void.

Held, further, that the various parts of the law (chapter 161, Laws 1901) are interdependent, and those features of the enactment which are not unconstitutional cannot be divorced from those which violate the constitution, and hence no part of the law can be upheld.

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Appeal from District Court, Cass County; *Pollock*, J.

Action by Jennie B. Angell against Cass County and another. Judgment for defendants, and plaintiff appeals. Reversed.

Newman, Spalding & Stambaugh, for appellant.

Statute, Chap. 161, Laws 1901, is a general statute and is not a uniform operation. It is a law for the collection of delinquent taxes. Its title declares it to be an act to enforce the payment of taxes. Under § 2 the list filed by the auditor must contain all real estate against which there appears to be any taxes charged for the year 1896 or any prior year or years. Also if any piece shall have been sold to the county at the sale for 1895 or 1896 the list shall include each year's taxes for the years subsequent to 1896, except as to the taxes of 1896 and as to the limitation of the operation of the law to certain counties. The statute is a substantial re-enactment of Chapter 67, Laws 1897. The provisions of the statute are identical with the laws of Minn. 1881, Chap. 35, § 1, and Laws of Minn. 1893, § 1, Chap. 150, construed by the Minn. court. *Croswell* v. *Benton*, 54 Minn. 264, 55 N. W. Rep. 1125. By these provisions the legislature voluntarily surrenders all title, right or lien which the state had theretofore acquired under tax sales of land bid off for the state or county, whether such sales were valid or invalid. *McHenry* v. *Kidder County*, 8 N. D. 418. The statute in question is a general law. The constitution requires that it should be, (§ 176, Const.), and prohibits its special laws for the collection of taxes. § 69, Subd. 23, Const. The statute must have a uniform operation in all parts of the state where are found the objects of the legislation. § 11, Const.; *State* v. *Bargus*, 53 Ohio St. 94, 53 Am. St. Rep. 628; *Vermont L. & T. Co.* v. *Whithed*, 2 N. D. 93; *Duluth Banking Co.* v. *Koon*, 84 N. W. Rep. 337. The statute is not a uniform operation because its title limits its operation to those counties wherein proceedings under Ch. 67, Laws 1897, were not instituted, or where such proceedings were defective. *Vermont L. & T. Co.* v. *Whithed*, 2 N. D. 94; *Duluth Banking Co.* v. *Koon*, 84 N. W. Rep. 337; *McHenry County* v. *Kidder County*, 8 N. D. 413. Classification by counties is permissible only when it has reference to, is connected with, or affects some function of local county government. *Weinman* v. *Ry. Co.*, 12 Atl. Rep. 288. The act is broader than its title. The entire subject of legislation is not included in the title, but a portion of it is specifically excluded therefrom. § 61, Const.; Cooley on Constitutional Limitations, 177; Sutherland's Statutory Construction, 87; *State* v. *Nomland*, 3 N. D. 432.

Newton & Smith, Morrill & Engerud, for respondents.

Chapter 67, Laws 1897, was not available for more than one effort for its enforcement in the same county. It did not stand to be used at any time at the discretion of the county officials; it was available for a reasonable length of time and not indefinitely. *Emmons County*

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v. *Lands of First Nat. Bank,* 9 N. D. 583, 84 N. W. Rep. 379; *Cass County* v. *Security Inv. Co.,* 7 N. D. 528, 75 N. W. Rep. 775. Certain counties proceeded under this act and the proceedings were upheld by this court. *Wells County* v. *McHenry County,* 7 N. D. 246; *Emmons County* v. *Lands of First Nat. Bank,* 9 N. D. 583. It is not the form but the effect of a statute which determines its special character. *Edmonds* v. *Herbrandson,* 2 N. D. 270. A public law of universal interest, embracing all the people of the state or all of a certain class of citizens and not limited to any particular locality is a general and not a special law. *Vermont L. & T. Co.* v. *Whithed,* 2 N. D. 82. The constitutional requirement that all laws of a general nature should have a uniform operation is satisfied if the benefits and burdens fall equally upon all members of the class upon which it operates. *Vermont L. & T. Co.* v. *Whithed,* 2 N. D. 82. A classification by the legislature must be natural and not artificial. It must stand upon some reason. *Edmonds* v. *Herbrandson,* 2 N. D. 270; *Plummer* v. *Borsheim,* 8 N. D. 565. Where a general law uniform in its operation is required, this law is none the less general and uniform because it divides the subjects of its operation into classes and applies different rules to the different classes. *Nichols* v. *Walter,* 33 N. W. Rep. 800. A classification of legislation should be based upon some operation under reasons suggested by necessity. *Cobb* v. *Bord,* 42 N. W. Rep. 396; *State* v. *Hamre,* 42 N. J. Laws, 439; *Louisville Ry. Co.* v. *Wallace,* 11 L. R. A. 787. Law are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws. *People* v. *Wright,* 80 Ill. 388; *Hawthorne* v. *People,* 109 Ill. 302; *McAunich* v. *Ry. Co.,* 20 Ia. 343; *Iowa, etc., Co.* v. *Soper,* 31 Ia. 116; *Bucklow* v. *Ry. Co.,* 64 Ia. 603; *Central Trust Co.* v. *Sloan,* 65 Ia. 655; *Honore* v. *Home Nat. Bank,* 80 Ill. 489. Chapter 67, Laws 1897, relates only to real property taxes delinquent in the year 1895 and prior years. It waived all right arising to the state or county on account of prior sale or forfeiture, and only retained the right to the tax and its lien upon the property upon which assessed and levied. *McHenry County* v. *Kidder County,* 8 N. D. 413. While a statute must stand or fall by its opration, rather than by its mere form, yet, in passing upon the constitutionality of a statute, the court can judge of its operations only through facts of which it can take official notice. The court cannot take testimony to determine the operation of a statute and thereby declare it unconstitutional. *State* v. *Nelson,* 26 L. R. A. 317. A classification made by the act in question is upon necessary and constitutional lines; it is of a general nature and has o uniform operation. It is not local or special. *State* v. *Nelson,* 26 L. R. A. 317; Sutherland's Statutory Construction, 152, note 3.

J. E. Robinson, for appellant.

Chapter 161, L. 1901, conflicts with the provision in the state

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constitution that all laws of a general nature shall have a uniform operation and that the legislative assembly shall not pass local or special laws for the assessment or collection of taxes. *Vt. L. & T. Co.* v. *Whithed,* 2 N. D. 82; *Plummer* v. *Borsheim,* 8 N. D. 565; *Edmonds* v. *Herbrandson,* 2 N. D. 27; *State* v. *Nomland,* 3 N. D. 427; *Divet* v. *Richland County,* 8 N. D. 65; Sutherland's Statutory Construction, § 116-128.

WALLIN, C. J. The complaint is this case discloses the following state of facts: In the year 1901 real estate tax judgments were entered in the district court for Cass county against numerous parcels of land in said county, which judgments were entered in a tax proceeding instituted in said court pursuant to the provisions of chapter 161 of the Laws of 1901. This action is brought by a taxpayer of Cass county to enjoin the sheriff of the county from selling said parcels of land to satisfy said tax judgments. The complaint charges in effect that said sheriff, in compliance with the requirements of said chapter 161, has advertised said tracts of land for sale, and threatens to sell the same, and that he will sell the same to satisfy said tax judgments unless he is enjoined from doing so, and that such advertisement and sale, if allowed to proceed, will necessarily involve an unlawful expenditure of public funds, to be taken from the treasury of the county. No question of practice is presented by counsel. To the complaint defendants have interposed a general demurrer for insufficiency. In the trial court the demurrer was sustained, and a judgment was entered dismissing the action, from which judgment the plaintiff has appealed to this court. In this court the constitutional validity of chapter 161 is broadly challenged. Appellant's counsel contend that the statute is a void enactment, in this: that it violates and runs counter to sections 11, 61, 176, and subdivision 23 of section 69, of the state constitution. In reaching a conclusion in the case, we have found it to be unnecessary to consider the validity of the law with respect to either section 61 or section 176 of the state constitution; and we shall, therefore, in discussing the case in this opinion, confine our attention to questions arising under section 11 and subdivision 23 of section 69 of the organic law.

Section 11 is as follows: "All laws of a general nature shall have a uniform application." Section 69 is mandatory upon the legislative assembly, and prohibits that body from passing any special or local law "for the assessment or collection of taxes." Subdivision 23, supra. It will therefor become necessary, in construing chapter 161, to inquire whether the same, which is strictly a law for the collection of taxes, is either a special or a local law. If it is found to be either the one or the other, such finding will dispose of the case, and necessitate a reversal of the judgment, for the obvious reason that the legislature is, in terms, prohibited by the constitution from encating any such law. On the contrary, if the conclusion is reached that chapter 161 is neither local nor special in character, but is a general law, it will then become necessary to determine whether the

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enactment meets the constitutional requirement of uniformity.

Proceeding to a consideration of this question, it will be conceded that the act of 1901 is general in its form, and purports on its face to be a general law. The subject-matter of the statute—the collection of unpaid taxes upon real estate—is one of common interest to every citizen and taxpayer within the state. It is further true that the operation of the law is not in express terms confined to particular localities, or to a particular class of individuals. Nor is there anything in the law which in express terms prevents its taking effect in any county within the state in which the conditions and circumstances described in the statutes are found to exist. In all these enumerated aspects of the law it has the appearance and characteristics of a general law. Nevertheless we shall be compelled to hold, under well-settled rules of statutory construction, that this act, which, so to speak, masquerades as a general law, is in fact and in its practical operation a special law for the collection of taxes, and, as such, falls squarely under the ban of the constitution (subdivision 23, § 69, supra).

By the act of 1901 the legislative assembly has attempted to make a classification of the counties within the state for the purpose of collecting unpaid taxes upon certain designated classes of real estate, and, in doing so, has attempted to confer upon the officials of some counties of the state authority and power with respect to the collection of taxes which cannot be exercised by the officials of other counties with respect to similar taxes upon the same class of lands, and which were assessed for the same years. It is further true that by this statute the lawmaker has attempted to impose burdens upon a class of taxpayers owning lands in certain counties, from which burdens taxpayers of the same class in other counties have entire immunity. This classification we hold to be erroneous, because the same is attempted to be made arbitrarily, and, as far as we are able to see, for no substantial reason whatever. It is true and quite elementary that a proper classification of subjects for the purpose of legislation is permissible, and is of very frequent occurrence. Our own statutes are replete with examples illustrating this kind of legislation. It often happens that a proper subject of legislation is generic, and may be divided into classes; and when such is the fact the courts uniformly have sustained a classification of the subject-matter for purposes of enacting laws adapted to the needs of the subject-matter as classified. Nor can such enactments, where the classification is properly made, be construed as special legislation. Nevertheless the right of the legislative assembly to classify subjects for the purposes of legislation must be kept within the limits laid down in the constitution. The lawmaker is not permitted, under the guise of classifying subjects of legislation, to violate an express prohibition of the constitution against special legislation. The courts are unanimous in holding that the right to make classifications is subject to qualification, and that very important restrictions must be

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placed upon the right. There is abundant authority holding in effect that such classification may not, on the one hand, be purely arbitrary, and, on the other, that the same, to be sustained, must rest upon some substantial ground and sound reason, having regard to the character of the legislation; and it is the province of the judiciary to determine whether the legislature, in a given enactment, has overstepped its authority in attempting to classify for purposes of legislation.

In an early case this court had occasion to consider the question we are here discussing, and did so with reference to the constitutional prohibition against special or local legislation in the matter of "locating or changing county seats." See *Edmonds* v. *Herbrandson*, 2 N. D. 270, 50 N. W. Rep. 970, 14 L. R. A. 725. In the opinion filed in that case, formulated by Corliss, C. J., the entire subject was reviewed and carefully considered in the light of both reason and authority, and many of the leading adjudications upon the subject were cited in that case. In disposing of the case at bar we deem it unnecessary to go beyond the authority of that case, and those upon which it rests for support. Nor does it appear to be necessary, in deciding the case at bar, to quote at great length or to recast the language employed by this court in deciding that case. The governing rule stated and reiterated in the authorities is well settled, and the rule is variously stated in the cases from other states which are cited in the Edmonds Case. This court gave expression to the rule as follows: "But it is our opinion that every law is special which does not embrace every class of objects or persons within the reach of statutory law, with the single exception that the legislature may exclude from the provisions of a statute such classes of objects or persons as are not similarly situated with those included therein in respect to the nature of the legislation. The classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation." In *State* v. *Pugh*, 43 Ohio St. 98, 1 N. E. Rep. 439, the court said: "It is not the form a statute is made to assume, but its operation and effect, which is to determine its constitutionality." In *Lodi Tp.* v. *State*, 51 N. J. Law, 402, 18 Atl. Rep. 749, 6 L. R. A. 56, the following language was used: "The rule is that, in any classification for the purposes of a general law, all must be included and made subject to it, and none omitted that stand upon the same footing regarding the subject of legislation."

Applying the tests as laid down in the cases cited, we are to inquire whether, in dividing the counties of the state for the purposes of collecting taxes upon designated classes of real estate, the legislative assembly in the act of 1901 has exceeded its authority. We think it has done so. The act authorizes the officials of the counties within a class, which class it creates and defines, to institute judicial proceedings for the collection of unpaid taxes upon certain real estate, viz., real estate upon which taxes of 1896 and prior years are

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unpaid. The right of any county to enjoy the privileges of the act of 1901 depends upon an event, i. e., whether the county has or has not had the benefit of chapter 67 of the Laws of 1897. If it has, it is excluded. If it has not, it is brought within the class, and may proceed to institute judicial proceedings for the collection of taxes as prescribed in chapter 161. The act of 1897 applied to the whole state, and under it judicial proceedings could have been instituted to collect real estate taxes which became delinquent in 1895 and prior years. We are bound to presume that in passing the law of 1901 the legislative assembly became aware of the important fact (one of common knowledge) that many counties of the state, for one cause or another, had failed to take the benefit of the act of 1897, and that the law of 1901, as clearly expressed on its face, was enacted for the benefit of such counties only as had omitted to proceed under the earlier law. To our minds, there was presented in this a valid and substantial reason for enacting a law for the benefit of the counties which for any cause had failed to obtain the benefits of the law of 1897; and hence it would have been proper to classify such counties, and pass an act adapted to the conditions of the counties within the class, and thereby place all the counties of the state upon a common footing with regard to the taxes which might have been collected under the act of 1897. Had the law of 1901 simply met the exigency, and stopped there, we can see no reason why it should not have been a proper classification of counties for purposes of legislation. But the legislature, by charter 161, has gone much further than this, and has attempted to confer especial privileges upon the officials of the counties within the class, by giving this privileged class of officials power and authority in the way of enforcing the payment of taxes upon real estate which are denied to all county officials who are not embraced within the classification made by the act. Acting under chapter 161, the favored county officers may proceed (those in Cass county have proceeded) to institute judicial proceedings for the collection of taxes on lands within their counties for the years 1895 and 1896 and subsequent years, none of which taxes could have been collected under the law of 1897. Other county officials of the state (those not within the class) are debarred from resorting to the remedies provided in the act of 1901 for the collection of unpaid taxes on land for the same years. In this we discover a classification which, in our opinion, is purely arbitrary, and one for which no sound reason has been suggested by counsel; and, in our opinion, none can be suggested. The result of this legislation would be, if permitted to stand, that taxpayers owning lands in counties within the privileged class, and others owning lands outside of such counties would not be amenable to the same law, and burdens would be placed upon some taxpayers which others do not bear; both classes being delinquent for nonpayment of taxes upon these lands for the same year or years. Such legislation we hold to be nothing less than special legislation for the collection of taxes,

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and, as such, null and void, under the constitutional prohibition against such legislation. See subdivision 23, § 69, supra, and *Trust Co.* v. *Whithed*, 2 N. D. 82, 49 N. W. Rep. 318.

But counsel for the respondents contend that, at the least, the law of 1901 should be upheld in so far as it provides for the collection of taxes on land for the year 1894 and prior years, and this contention is placed upon the rule that a statute which is unconstitutional in one or more of its features may be upheld in all other respects. The rule invoked by counsel is well established, and has been applied in numerous cases, but we are very clear that it is inapplicable to the act of 1901. This rule, as stated by Mr. Justice Matthews in *Poindexter* v. *Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 962, 29 L. Ed. 185, is as follows: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact." In *McDermont* v. *Dinnie*, 6 N. D. 278, 69 N. W. Rep. 294, Bartholomew, J., speaking for this court, stated the rule as follows: "In many cases statutes have been thus destroyed in part and upheld in part. But that can only be done where the statute remaining after the elimination of the unconstitutional portion is in itself a complete law, capable of enforcement, and such a one as it is presumed the legislature would have passed without the rejected portions. If the different portions of the statute are so interwoven and interdependent that the rejected portion furnishes to an appreciable extent the consideration or inducement for the passage of the act, then the entire enactment must be rejected." Applying the rule as thus expounded to the act of 1901, it is manifest that the same cannot be upheld even in part. It appears from examination of the title and the various provisions found in the body of the statute that all parts of the enactment are interdependent. The act as written would certainly become nonenforceable if all parts of the same relating to unpaid taxes of 1895 and 1896 and subsequent years should be eliminated by construction. See the title and sections 1 and 2. To trim down the statute so that it would include only unpaid taxes for the year 1894 and prior years, it would become necessary to eliminate from its title and from its body numerous substantial provisions, and to insert in lieu thereof certain other provisions which this court could suggest as being proper to insert, in order to render the statute free from objection on constitutional grounds. For example, in the title this court would have to substitute the phrase "for the year 1894" in lieu of the words "for the year 1896," which are actually found in the title as enacted. In making the list which the

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auditor is required to make, other changes in the language would become necessary. It would would be necessary, as to section 2, to strike out the year 1896 and insert the year 1894, and the following language would have to be expunged, and no similar language inserted in its place: "If any piece or parcel aforesaid shall have been sold to the county at the sale for taxes of 1895 or 1896 the list shall also include each year's taxes for the years subsequent to 1896, with penalty and interest added, down to, but exclusive of, the year in which the list is filed." Again, the law as written authorizes the clerk of the district court to prepare for publication a certain notice of the pendency of the proceeding, but such notice cannot be framed or published until the particular list prescribed in section 2 of the law has been filed in the clerk's office, and the judgment cannot be entered unless it rests upon the proceedings laid down in the statute which leads up to the entry of judgment. It is therefore apparent that all the machinery for entering judgment against any land for taxes, as found in this statute, is interwoven in such a way that no judgment can be entered which does not include as a basis the aggregate taxes of 1895 and 1896, as well as those for 1894 and prior years. Hence it appears that, to limit this statute by construction so that it would operate only upon taxes in 1894 and prior years, it would become necessary to strike from the law as enacted many of its most vital provisions. To do this, in our judgment, would be to overstep the province of a court, and involve, in its most offensive form, an act of judicial legislation. Moreover, we think that the very terms of the act in question show unmistakably that the collection of the taxes of 1895 and 1896 and those of subsequent years was a consideration which operated in no small degree as an inducement leading to the passage of the act. For this reason, also, we find that no part of the law can be sustained under the authorities above cited.

Our conclusions in this case are based upon the language of the law itself, and upon such facts as are of common knowledge in this state; and we find it unnecessary, in deciding the case, to consider certain facts set out in the last paragraph of the complaint, and to which we have made no reference in this opinion. But we do not wish to be understood as intimating that in deciding a constitutional question, such as is presented in this record, it would be improper, under the authorities, to consider extraneous facts, such as are embodied in the complaint and admitted by the demurrer, and which were expressly conceded to exist by defendants' counsel in his oral argument in this court, viz., the fact that some counties in the state did avail themselves of the act of 1897, and that others did not do so. Upon this feature of the case we shall content ourselves with a citation of certain cases which are cited by appellant's counsel in their brief, and which have a bearing upon this feature of the case. See *State* v.

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Bargus, 53 Ohio St. 94, 41 N. E. Rep. 245, 53 Am. St. Rep. 628; *Wagner* v. *Milwaukee Co.*, (Wis.) 88 N. W. Rep. 577; *City of Hopkins* v. *Kansas City, St. J. & C. B. R. Co.*, 79 Mo. 98.

Our conclusion is that chapter 161, Laws 1901, embraces special legislation which is unconstitutional and void, in this: that the same violates subdivision 23 of section 69 of the state constitution.

The judgment of the trial court will be reversed, and that court directed to enter judgment for the plaintiff for the relief demanded in the complaint, together with the costs and disbursements of both courts. All the judges concurring.

(91 N. W. Rep. 72.)

MAY V. THOMPSON *vs.* TRAVELERS' INSURANCE COMPANY.

Life Insurance Policy—Forfeiture.

A life insurance policy contained the following provision: "This policy shall not take effect unless the first premium is actually paid while the insured is in good health." The policy was issued on September 4, 1900, upon an application dated August 23d. The policy was delivered to a third party on September 15th, for delivery to the insured, at the request of the insured, said third party having paid the premium at the request of the insured. On September 28th the insured died from a sickness claimed to have existed before September 15th. The premium paid on September 15th to the agent was received at the main office on October 12th. The company had no notice until about October 15th, and after insured's death, of any change in insured's health since he made his application for insurance. *Held*, that the company is entitled to interpose such defense without a tender or payment back of the premium.

Waiver.

Held, further, that receipt and retention of premiums with knowledge of forfeiture of policy or of defenses against an action on the same is ordinarily a waiver of such forfeiture or defense.

Return of Benefits.

Held, also, that the rule in equity actions to cancel or annul contracts, that the party moving must return everything of value received pursuant to the contract, is not applicable to the facts of this case.

Evidence—Error.

On the trial an answer was allowed to the following question, duly objected to: "Did the defendant corporation, * * * or any one of them, pay back to you the $53.24?" *Held* prejudicial error for which a new trial will be granted.

Appeal from District Court, Barnes County; *Glaspell*, J.

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Action by May V. Thompson against the Travelers' Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

John E. Greene, for appellant.

Winterer & Winterer, for respondent.

MORGAN, J. On the 23d day of August, 1900, the plaintiff's husband, Horace S. Thompson, made an application for a policy of life insurance in the defendant company for the sum of $2,000. On the 4th day of September following the policy was issued to said Horace S. Thompson pursuant to such application, and sent to the local agent of the company at Valley City, N. D., and received by said agent on September 11th. On the 15th day of September the policy was delivered to one Tracy for said Thompson, upon payment by him on that day, through said Tracy, of the premium, amounting to the sum of $53.24. The policy was made payable to plaintiff in the event of the death of said Thompson. He died on September 28, 1900. Proofs of death were made on October 15, 1900. Payment under the policy was refused by the company, and this suit followed. The complaint states a cause of action against said defendant for the recovery of $2,000 by virtue of said policy and the death of said Thompson while such policy was in force. The answer to said complaint alleges as a defense the following facts, viz.: "That the said policy of insurance so delivered to and accepted by, said Horace S. Thompson contained a provision in the following words: 'This policy shall not take effect unless the first premium is actually paid while the insured is in good health.' That in truth and in fact the said Horace S. Thompson was not in good health on the date of the payment of said premium, but, on the contrary, he was at that time suffering from bodily injuries sustained, and with disease contracted, subsequent to the date of his application for the policy aforesaid, from which he did not thereafter recover, and from which, one or both, on the 28th day of September, 1900, he died. That this defendant had no notice or knowledge of the fact of said Thompson being so in ill health until the proofs of death above mentioned were submitted to it, to-wit, on or about the 15th day of October, 1900." A trial resulted in a verdict in favor of the plaintiff. A motion for a new trial was made upon a statement of the case duly settled, and the motion was denied. Judgment was duly entered on said verdict. The defendant has appealed to this court from such judgment, and assigns errors, in substance, as follows: Errors in the admission of evidence; in refusing to direct a verdict for the defendant at the close of the evidence; the insufficiency of the evidence to justify the verdict; and the refusal to grant the motion for a new trial.

On the trial the issues that were contested were (1) whether said Thompson was in good health on September 15th, when the premium was paid by, and the policy delivered to, the said Thompson;

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(2) whether the retention of the premium by the company was a waiver of its right to assert that the policy of insurance was never in force by reason of that condition in the policy set forth in the answer.

We will consider the last-mentioned question first, and to do so will require a further statement of the facts to be given in addition to those already recited. About September 1st the insured was injured in a runaway accident, resulting in a broken rib. A doctor treated him for such injury by applying bandages on two occasions when the insured visited the doctor's office. The insured made a trip to St. Paul between the dates of these two treatments, and remained there three or four days, returning on September 10th. On September 13th he was suffering from a dull headache, and was in bed a part of the time only. On the evening of that day he made arrangements with his friend Tracy to pay the insurance premium and procure his policy on the following Saturday, in case his health or the weather prevented his going to Valley City, as he then intended to do. He did not go to Valley City, and Mr. Tracy did as requested. On Sunday night his headache became very severe, and a doctor was sent for in the morning of Monday the 17th and visited him on the same day. He thereafter had the insured under his care as a physician, and visited him at times until his death, on the 28th. The agent of the defendant received the premium on the 15th of September, and sent it to the St. Paul office, and in due course of business it was received at the main office of the company at Hartford, Conn., on October 12, 1900. It is beyond dispute that neither the agent of the company at Valley City nor any of the officers of the company had any knowledge of the insured's health on September 15th, except such as was communicated to said agent or officers of the company by the application for insurance of August 23d. Neither the agent nor the company had any knowledge of the broken rib, or of any sickness of the insured, when the premium was paid, on September 15th. The proof of death was made out in Valley City on October 15th, and sent to the company at Hartford, and on receipt of such certificate of death the company first learned of any change in insured's health from that indicated in his application for insurance. It is apparent, therefore, that neither the company nor its agent had any knowledge that there had been any change in the condition of insured's health from that as represented in the application at the time the premium was paid to or received at the main office at Hartford. At the time of receiving such knowledge of change of health it also received knowledge that the insured had died. So that the question of the waiver of defenses by virtue of receiving premiums with knowledge of facts that the policy is void or has never been a binding contract with the company for any cause is not involved in this case, as the company accepted such premium in ignorance of any change in the physical condition of Thompson since August 23d. The authorities uniformly hold that the acceptance of the premium under such cir-

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cumstances does not constitute a waiver of a forfeiture or other defense, and the same may be pleaded in avoidance of all claims under the policy when suit is brought upon it. Joyce, Ins. § 1369; *Insurance Co.* v. *Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Bingler* v. *Insurance Co.*, (Kan.) 61 Pac. Rep. 672.

In this case the premium was not accepted with knowledge that the conditions of the policy as to the health of the insured at that time were not true. The insured was dead, and the contract was at an end, except as to actions thereon, before the agent or the company had knowledge that the policy never existed as a binding contract. The question is thus presented, however, whether the company can now interpose the defense claimed without returning or offering to return the premium paid. At the death of the insured, on September 28th, the rights of the insured and of the insurer became fixed. No new contract between the parties by a waiver or an estoppel could be created, as one of the contracting parties was dead. The case is not parallel as to its facts with one where the premium was paid by an insured upon a policy which the insurer is endeavoring to cancel through an action in a court of equity. In such a case, a return, or an offer to return, everything of value received under the policy must be made at or before the commencement of the action. This is based upon the equitable principle that a person will not be allowed to retain anything in an action which he brings to cancel a contract which he repudiates. He cannot be allowed to profit by a cancellation of the policy and by retention of the premiums paid thereon. In this case the defendant is not seeking any affirmative relief. It seeks to establish that there never existed a policy of insurance in favor of the deceased in defendant's company, by reason of the fact that it was delivered under circumstances that by its own terms provided that it should not come into effect. The policy provided that it should not take effect unless the insured was in good health when the first premium was paid. By paying the first premium when not in good health, if such was the fact, the insured violated one of the material stipulations of the policy. Such condition or stipulation was of the very essence of the contract, and a violation of it was in effect a fraud upon the company, whether so intended or not. The insured had been examined as to his physical condition and health, and such examination was satisfactory to the defendant. Under this clause of the policy, the condition of the insured must continue without change up to the payment of the first premium or the policy would not take effect. By applying for such policy and paying the first premium, the insured violated that condition or stipulation of the policy unless he was in good health at that time. "Where a life insurance policy contains a condition to the effect that no obligation is assumed by the company, unless at the date of the policy the insured is alive and in sound health, there can be no recovery upon such policy if it is made to appear upon the trial that the insured was not in sound health at the date of the

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policy." *Insurance Co.* v. *Howle*, 62 Ohio St. 204, 56 N. E. Rep. 908. The same principle is upheld in *Plumb* v. *Insurance Co.*, 108 Mich. 94, 65 N. W. Rep. 611. In *Blaeser* v. *Insurance Co.*, 37 Wis. 39, 19 Am. Rep. 747, the following language is used in a case involving the question of the duty of the insurance company to return premiums in actions brought on fire insurance policies claimed to be void by reason of misrepresentations made in the application for insurance: "It is not necessary that the company refund the premium in order to avail itself of this stipulation in the policy. The representations in the application constitute the basis upon which the risk is taken, and the policy declares that if there is any misrepresentation or concealment the insurance shall be void and of no effect. The company enters into the contract relying upon the truth of the representation, and, if it has been misled or deceived upon matters material to the risk, it may well say that no contract was ever made; that there was no concurrence of assent upon the same facts." Cases holding that a retention of the premium after knowledge of facts forfeiting the policy do so upon the ground that by retaining the premium the company has led the insured to believe that he has a valid policy, and the company will not be permitted, to the prejudice of the insured afterwards, to repudiate the policy on account of such forfeiture. In this case no prejudice has or can follow the retention of the premium. When received the insured was dead. The rights of the insured and assured, so far as the policy was concerned, were then established. No new contract could be made by express terms or by reason of any conduct or acts of the company thereafter, so far as the insured was concerned. Waivers are sustained because the insured have been misled to their prejudice. Nothing of that nature appears in this case, and cannot appear, as the insured died before the company had knowledge of any facts that the policy never went into effect, and no premiums were received after such knowledge. *Dowd* v. *Insurance Co.* (Sup.) 1 N. Y. Supp. 31.

There is another reason in this case why the company has waived no right by retaining the premium. The deceased paid the premium. It was his money. If the company was bound to return this premium, it could not have been returned to the insured. There is no evidence that any administrator or executor was appointed for his estate. To whom could the company safely return the money? The record does not show that it could have been returned to any one without incurring the risk of having to pay it again to the legal representative of the deceased when appointed. The defendant was not under obligations to return the premium, and could not have done so to any one lawfully entitled to receive it. Of the cases cited or found, not one goes to the extent of holding that the company is estopped from interposing the defense claimed until the premium is returned. In *Harris* v. *Society*, 64 N. Y. 196, the court held that an offer to confess judgment was all that a company was required to do in cases of suits on policies where forfeiture was

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claimed and the premium had not been returned. That was a case of a policy taken out by the husband on the life of his wife. The husband paid the premium, and the company could have returned it to him, but the court held that the company was not estopped from asserting the defense by its failure to do so. The facts of that case do not make it an authority that a return of the premium, if paid by the insured before death, would preclude the company from interposing a defense of forfeiture when no representative of the estate of the insured had been appointed entitled to receive the premium. Nor is *McQuillan* v. *Association,* (Wis.) 87 N. W. Rep. 1069, authority in this case. In that case the premium had been paid by an assignee of the policy with knowledge of the forfeiture, and a return could safely have been made to such assignee. Not one of the numerous cases cited by respondent is in point on the facts of the case at bar. These cases are cases where premiums were paid, accepted, and retained with knowledge of the facts constituting the forfeiture, and of course it was held that the companies were thereafter estopped to plead the forfeiture claimed. With that doctrine this court fully concurs. But we decline to go to the extent of holding that premiums received in ignorance of violations of policy stipulations and without knowledge thereof, until after the death of the person paying them, constitute a waiver of defenses in an action on the policy, when such premiums could not have been returned to any one lawfully entitled to receive them.

On the trial the following question was propounded to the plaintiff: "Did the defendant corporation, the Travelers' Insurance Company, or any one for them, pay back to you the $53.24?" The question was objected to as irrelevant and immaterial, and the objection was overruled, and the ruling excepted to. She answered that the premium had not been paid back nor had any offer been made to do so. This ruling is assigned as error. The objection should have been sustained. The answer was responsive to an issue not properly in the case. The fact of the retention of the premium by the company would be a persuasive argument with the jury that it should pay the policy. That the receipt of this evidence was prejudicial error, under the circumstances of this case, seems too clear for discussion or argument.

For the error in admitting such testimony the judgment is reversed, a new trial granted and the case remanded for further proceedings. All concur.

(91 N. W. Rep. 75.)

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First National Bank of Fargo *vs.* Minneapolis & Northern Elevator Company.

Conversion by Chattel Mortgage—Defenses--Payment--Authority of Agent.

In an action wherein a mortgagee seeks to recover damages for an alleged conversion of a quantity of wheat delivered to the defendant by the mortgagor, and in which the defense interposed is that the defendant paid for the wheat in controversy by paying certain debts due from the mortgagor to farm laborers, which payments it claims were made under the alleged authority of a person who, during three years just prior to the year in which the wheat was delivered, concededly was the mortgagee's agent, it is *held* that the trial court did not err in instructing the jury: (1) That any custom of paying labor claims existing between the parties in prior years would not justify the payments now relied upon; or (2) that the defendant must rest its defense of payment upon authority derived from plaintiff's alleged agent; or (3) in instructing the jury that there is no proof that such person was an actual agent during the year in question. (4) It is also held that the question of the ostensible authority of said alleged agent was fairly submitted to the jury under the instructions given, and that the court did not err in refusing defendant's requests referred to in the opinion; also (5) that the court did not err in refusing to instruct the jury that the grain, if converted at all, was converted when shipped out of defendant's elevator; nor, on the facts of this case, did the court err in instructing the jury as to the date when the conversion occurred.

Instructions.

In cases where the cautionary instruction, "Falsus in uno, falsus in omnibus," is proper, and is given, it is essential that the jury be instructed that the false testimony which will authorize them to discredit the testimony of a witness must be as to material facts, but it is not absolutely necessary that the word "material" shall be used in the instruction; and, when words plainly conveying the same meaning are used, the instruction will not be held erroneous. *Held*, that the instruction set out in the opinion, which omits the word "material," by other language sufficiently informed the jury that the false testimony must be as to material facts.

Depositions.

Under section 5682, Rev. Codes, a party to an action may read in evidence a deposition taken by his adversary, but his right to introduce the deposition does not extend to introducing mere excerpts or isolated parts thereof at his option. Upon objection, the court may, in its discretion, require all of the depositions to be read, or it may permit parts thereof relating to distinct transactions to be read; but in doing so the party should be required to read all of the evidence which relates to such transactions.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the First National Bank of Fargo against the Minneap-

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olis & Northern Elevator Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ball, Watson & Maclay, for appellant.

The acts of a former general agent within the scope of his original authority will, notwithstanding it revocation, continue to bind the principal to those parties who have been and still are dealing with him in good faith in reliance upon his former authority until they have had notice of its revocation. Mechem on Ag'cy, 224; Story on Ag'cy, 470; *Claflin* v. *Lenheim,* 66 N. Y. 301; *McNeilly* v. *Ins. Co.,* 66 N. Y. 23; *Packer* v. *Henckley,* 122 Mass. 484; *Direrscy* v. *Kellogg,* 44 Ill. 114; *Lamothe* v. *Ry. Co.,* 17 Mo. 204; *Ins. Co.* v. *McCain,* 96 U. S. 84. Defendant's request for instruction to the effect that the plaintiff bank owed to defendant the duty of notifying it that Eddy was no longer the bank's agent, if that was a fact, should have been given. *Cooper* v. *Schwartz,* 40 Wis. 54. After two trials and an appeal upon the theory that the plaintiff had no interest whatever in the Buckland wheat and the plaintiff's repeated admissions in open court to the same effect, it was an error in the court to submit to the jury the question whether the plaintiff was entitled to a portion of that wheat. Plaintiff was bound by its admissions made in open court. *Bingham* v. *Board,* 6 Minn. 136; *Leonard* v. *White,* 5 Allen, 177; *Ry.* v. *Shoup,* 28 Kan. 394; *Bank* v. *Sprigg,* 11 Md. 389. The court erred in charging that the proof against the existence of an actual agency was overwhelming. 11 Enc. Pl. & Pr. 97; 2 Thompson on Trials, 2287. The court erred in excluding the testimony of W. E. Ditmer, taken in deposition by plaintiff in 1897.

Newman, Spalding & Stambaugh, for respondent.

The court did not err in refusing plaintiff's counsel the right to read a portion of the deposition of W. E. Ditmer. Counsel announced that he intended to read only portions of the deposition and proceeded to read separate and detached questions, which he had no right to do. § 5682, Rev. Codes; *Scott* v. *Indianapolis Wagon Works,* 48 Ind. 82; *Grant* v. *Penderry,* 15 Kan. 184; *Bank* v. *Rhulasal,* 67 Ia. 316. It is in the discretion of the court whether it will permit a portion of the deposition to be read without requiring a reading of the whole. *Southwark Ins. Co.* v. *Knight,* 6 Horton, 327; *Bank* v. *McSpedon,* 15 Wis. 699; *Kilbourne* v. *Jennings,* 40 Ia. 473; *Prewitt* v. *Martin,* 59 Mo. 325; *Norris* v. *Brunswick,* 73 Mo. 256.

YOUNG, J. The plaintiff seeks to recover damages for the alleged conversion of a quantity of wheat grown by one W. E. Ditmer, in the year 1896, upon certain lands situated in Cass county, and delivered by him in the fall of that year to the defendant at its elevator in Argusville in said county, and upon which it is conceded that plaintiff had a chattel mortgage executed by said Ditmer. The jury returned a verdict for plaintiff for $581.46, and in respnose to the following special question submitted to them by the court: "For

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how many bushels do you find the plaintiff entitled to recover?"—they answered, "602." The sum awarded in the general verdict, as above stated, was for 602 bushels at 78½ cents per bushel, with interest from the 14th day of August, 1897, the alleged date of the conversion. A motion for new trial was made by defendant upon a statement of the case containing specifications of a number of alleged errors of law which were urged in support of the motion. The motion was denied. Defendant has appealed from the order overruling the same. The errors assigned in appellant's brief, and urged in this court, as grounds for reversing the order appealed from, relate entirely to rulings upon evidence and to the instructions. There is no controversy as to the fact that the wheat in question was delivered by Ditmer to the defendant, and that the plaintiff has an unsatisfied mortgage thereon, duly executed by Ditmer, and of record, as alleged, or as to the fact that, prior to the commencement of this action, plaintiff made demand for the wheat, which demand was not complied with. None of the foregoing facts are challenged by the defendant. On the contrary, it admits that it received the wheat from Ditmer, the mortgagor, and that the same was demanded by the mortgagee, the plaintiff herein, and that it refused, and still refuses, to deliver the same. Defendant denies, however, that it converted the grain in question and, as a complete defense, alleges that it bought and paid for the same in the regular course of business; that payment for said grain was made to certain farm laborers who worked for Ditmer, in 1896, in producing the crop for that year; and that such payments were made under the authority and by the direction of one E. C. Eddy, plaintiff's alleged agent. The defendant further claims that, even if there was a conversion of the grain, which it denies, it did not occur on August 14, 1897, the date at which the jury fixed its value, but that it occurred in the fall of 1896, when the grain was delivered to the defendant and by it shipped out of its elevator, at which time the price of wheat was considerably lower than in the following August.

The facts essential to an understanding of the questions to be considered may be stated as follows: In 1896, Ditmer was indebted to the plaintiff in a considerable sum; a large portion of his indebtedness had existed throughout the years 1893, 1894, and 1895; Ditmer was also indebted to E. C. Eddy during the same period; prior to 1895, Ditmer had given separate crop mortgages to secure his indebtedness to Eddy, and to the plaintiff bank; in 1895 the debts were, in form, consolidated, and the renewal notes and mortgage executed for that year ran to the bank. Eddy was employed by the plaintiff as its agent in the years 1893 and 1894, and had full authority as to directing the sale of the Ditmer grain and the disposition of the proceeds of the same. In 1895 the plaintiff bank entered into a written contract with Eddy, under which he was to give the matter of the disposition of the crops raised by Ditmer under the mortgages executed for that year his personal attention; and he

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did so. In April, 1896, Eddy conveyed his interest in the Ditmer debt to the bank. His authority to represent the bank was then revoked, and he was thereafter without actual authority to act for the bank in the Ditmer matters in any way whatever. Evidence was introduced by defendant to the effect that in the years 1893, 1894, and 1895, Eddy authorized the defendant's agent at Argusville, one Will Freeman to pay labor claims such as were paid in 1896; and the testimony of said agent is to the effect that he had no knowledge or notice that Eddy's authority was revoked in 1896, and that the payment of the labor claims in said year—and that is the defense interposed in this action—was made under Eddy's direction. The testimony of Eddy is to the effect that he expressly informed Freeman that he had no authority in reference to the crop of 1896, and, further, that he gave no directions as to the disposition of the same, and there is other evidence in the record that Freeman had notice of the revocation of Eddy's agency.

A number of errors assigned on the instructions are so related that they may be conveniently considered together. The following portions of the court's charge are assigned as error: (1) "The defendant does not claim that the farm laborers had a lien upon the 602 bushels, but must rest its defense upon the alleged fact that it was authorized by the agent of the plaintiff bank to thus dispose of such property." (2) "Any previous custom of paying farm laborers, existing between the parties, would not warrant the defendant paying such claims in 1896." (3) "There is no proof in this case of what is known as 'actual agency.' In other words, the proof is overwhelming that Mr. Eddy was not employed by the bank to take charge of this crop as an actual agent." It is also urged that error was committed in refusing the following instructions requested by the defendant: (a) "I charge you that if you are satisfied, from the evidence, that it had been the custom of the elevator company during the years 1893, 1894, and 1895, to pay labor claims and other expenses due upon the Ditmer lands, and that the bank had knowledge of the making of such payments and acquisced in them, you would be authorized in finding that the elevator company was justified in paying the four labor claims in question in this case." (b) "In deciding whether or not the bank used ordinary care under the meaning of the law as I have given it to you, I instruct you that you are entitled to consider what the conduct of an ordinarily careful and prudent person would have been under the same circumstances, and if you find that an ordinarily careful and prudent person occupying the position that the bank occupied, under the circumstances of this case, would have notified Mr. Freeman or the elevator company that Mr. Eddy was no longer its agent, then you are authorized to find that the bank did not use ordinary care."

It is perhaps unnecessary to state that the charge given must be considered as an entirety, and that it is to have a reasonable interpretation when considered in the same connected way in which it

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was given. "If, when so construed, it presents the law fairly and correctly to the jury, in a manner not caluculated to mislead them, it will afford no ground for reversing the judgment, although some of its expressions, if standing alone, might be regarded as erroneous, or because there may be an apparent conflict between isolated sentences, or because its parts may be in some respects slightly repugnant to one another, or because some of them taken abstractly, may have been erroneous." 2 Thomp. Trials, § 2407, and cases cited. In our opinion, the trial court did not err in giving the instructions complained of. Neither did it err is refusing the instructions requested by the defendant. The instruction that there is no proof in the case of actual agency on the part of Eddy, as to the crop of 1896, was proper, and is fully warranted by the evidence. "Agency is actual when the agent is really employed by the principal." § 4307, Rev. Codes. Eddy testified that his prior agency was revoked early in the spring of 1896, and expressly denies having been employed in reference to the 1896 crop in any way whatever. The officers of the bank are equally explicit in their testimony, and there is no evidence to the contrary. It is patent that there was no actual agency on the part of Eddy in 1896, and that, if any agency existed whereby Eddy could bind the bank, it was ostensible only. "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent, who is not really employed by him." Section 4308, Rev. Codes. The jury was fully instructed on the subject of Eddy's alleged ostensible agency. The meaning of the terms "ostensible agency," "ostensible authority," and "ordinary care," was carefully defined, and the jury was instructed generally that it must pass on the question of agency, and determine whether, under all the facts and circumstances of the case, Eddy was the ostensible agent of the bank in the transactions with reference to the wheat in question. And to this was added a more explicit instruction in the following language: "The defendant insists that Mr. Eddy was the ostensible agent of the bank, growing out of the acts of the bank in dealing with the defendant concerning the same. It has been shown in evidence that, for two or three years prior to that of 1896, Mr. Eddy was the agent of the bank in dealing with the Ditmer crops. And defendant claims that, by want of ordinary care, the plaintiff allowed the defendant to deal with Eddy in 1896, and permitted it to believe that Mr. Eddy was such agent, when, as a matter of fact, he was not; that the bank never, to the knowledge of the elevator company, interrupted the old arrangements existing between it and Mr. Eddy; that it never notified the defendant's agent, Mr. Freeman, of any change in Eddy's relations to it or to the wheat in question. All these questions are proper for you to consider as the same shall be disclosed by the evidence." The foregoing instruction sufficiently covered the defendant's second request, and we think fairly submitted to the jury for determination the question of Eddy's alleged agency.

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Neither, in our opinion, did the court err in instructing the jury that the defendant must rest its defense of payment upon authority derived from plaintiff or its agent, or in refusing the defendant's first request, which was to the effect that, if the jury found that a prior custom had prevailed between the parties to pay labor claims, it would justify the payment of the four labor claims upon which the defendant now relies. There was no evidence before the jury to which an instruction as to the legal effect of custom or usage was applicable. A custom or usage which is merely local must be proved as any other fact. Courts will not take judicial notice of it, nor can its existence be left, without proof by witnesses, to the private information of jurors. "The usage must be positively established as a fact, and not left to be drawn as matter of inference from individual transactions." 27 Am. & Eng. Enc. Law, 732-738, and cases cited; *Bodfish* v. *Fox*, 23 Me. 90, 39 Am. Dec. 611. The usage or custom which will bind parties affected thereby is defined by § 5128, Rev. Codes, as follows: "Usage is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby, existing at the place where the obligation is to be performed, and either known to the parties or so well established, general and uniform that they must be presumed to have acted with reference thereto." If it were conceded that a usage or custom could exist, as to the payment of labor claims by parties operating elevators, which would bind persons having an interest in grain deposited therein, nevertheless it would not avail the defendant in this case. The record contains no evidence, and none was offered at the trial, to show that any such usage or custom prevailed at Argusville or elsewhere. There is an entire absence of evidence as to the existence of a local usage or custom such as is defined by the statute above quoted. Neither is there any evidence that the payments upon which the defendant now relies, or any prior payments, were made by its agent in reliance upon a local usage or custom. On the contrary, it appears that all of the payments made in 1893, 1894, and 1895 were made under the authority and direction of E. C. Eddy, who, during such period, was clothed with full authority to direct such payments. If, in fact, Freeman paid labor claims in some instances in prior years without express directions, and his acts were ratified by Eddy or by the bank, this fact in itself would not authorize him to pay such claims in the future, at his own volition and without direction. Payments so made, not having been authorized, would not bind the plaintiff unless ratified. It is therefore evident that the payments made by the defendant in 1896, and upon which it now relies, must have been made under the authority of the plaintiff bank in order to constitute a defense. It is not important whether Eddy's alleged agency during the year 1896, when the payments in question were made, was actual or ostensible. The effect of his acts would be the same in either event, and would bind the defendant. This question was left to the

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jury, and was resolved against his alleged ostensible agency. Under the instructions last above quoted, the jury was authorized, for the purpose of determining whether Eddy was an ostensible agent, to consider the evidence as to his relation to the Ditmer matters in former years, and also the evidence as to Freeman's knowledge or ignorance of the revocation of Eddy's authority. By these instructions, the jury was authorized to give the evidence referred to its full legal effect, and the same was, in our opinion, favorable to the defendant.

The court also refused the following request: "If the elevator company converted the wheat in question at all, such conversion took place at the time the wheat was shipped out of the elevator, and for such wheat so converted your verdict should be in favor of the plaintiff for the market value of the wheat at the time it was shipped out, with interest from that date at the rate of seven per cent. per annum;" and instructed the jury, on this subject, that "the conversion of the wheat, if you find that there was such conversion, took place on the 14th day of August, 1897." Evidence of the market value of wheat in Argusville on August 14, 1897, was admitted over defendant's objection. The giving and refusal of the foregoing instructions and the admission of the testimony referred to are assigned as errors. The assignments cannot be sustained. The facts which fix the date of the alleged conversion are not in dispute. The wheat in question was deposited in the defendant's elevator in the months of October and November, 1896. It was placed there by the owner, and the defendant was therefore in lawful possession. The plaintiff, by virtue of its mortgage, was entitled to possession upon demand. A demand followed by a refusal would constitute a conversion. No demand was made until February 12, 1897, when plaintiff's attorneys wrote to defendant's general manager at Minneapolis, Minn., demanding the grain in controversy, and requesting a reply as to whether or not it would be delivered. This letter was not answered. On February 24, 1897, a second letter was written, similar in substance to the first; to this letter the general manager replied, acknowledging the receipt of both letters, stating that he had forwarded the same to C. F. Sims, the defendant's general superintendent at Grand Forks, with the request that the matter be investigated by him. He also requested the plaintiff's attorneys to conduct their further correspondence with reference to the matter with said Sims. On March 2, 1897, plaintiff's attorneys wrote to said superintendent, referring to their former correspondence with the general manager, repeating the demand for the grain in controversy, and requesting an answer at the earliest practicable moment whether the demand would be complied with. This letter, if received at all by the superintendent, was not answered. Nothing further was done until August 13, 1897, when plaintiff's counsel again wrote the general superintendent, calling his attention to the several prior communications, and making demand for a delivery of the grain. This letter was sent by regis-

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tered mail. On the 14th day of August, plaintiff's attorneys received a registry receipt therefor, signed by the superintendent. This letter was not answered, and on August 18, 1897, this action was commenced. On this state of facts we are entirely clear that the instruction given was proper, and that the trial court properly refused to instruct the jury that the conversion occurred in the fall of 1896, when the defendant shipped the wheat out of its elevator. As previously stated, the defendant was rightfully in possession of the grain. Its obligations were fixed by the statute, and the fact that it may have mixed the grain with other grain, or that it may have shipped it out, if such was the fact, did not constitute a conversion. Under the law it could fully comply with its obligations to the owner or person entitled to possession by delivering to such person an equal quantity of wheat of like grade; and only upon a demand by the person entitled to possession, and a refusal on its part, would it be liable for a conversion. § § 1790-1792, Rev. Codes; *Best* v. *Muir,* 8 N. D. 44, 77 N. W. Rep. 95, 73 Am. St. Rep. 742; *Marshall* v. *Andrews,* 8 N. D. 364, 79 N. W. Rep. 851; *Towne* v. *Elevator Co.,* 8 N. D. 200, 77 N. W. Rep. 608. See, also, *Sanford* v. *Elevator Co.,* 2 N. D. 6, 48 N. W. Rep. 434. Neither can the defendant be heard to say that the conversion occurred when the earlier letters were written. True, each letter contained a demand, but each letter called for a reply. The defendant neither complied with nor expressly refused any of the several demands. The reply of the general manager indicated that the matter was being investigated. The defendant, being in rightful possession of the grain, had a right to a reasonable time in which to investigate the plaintiff's claim before it could be compelled to surrender the grain or refuse to do so. *Manufacturing Co.* v. *King,* 14 R. I. 511; *Dowd* v. *Wadsworth,* 13 N. C. 130, 18 Am. Dec. 567; *Carroll* v. *Mix,* 51 Barb. 212.

The following instruction is also assigned as error: "If any of the witnesses are shown knowingly to have testified falsely on this trial, touching matters here involved, the jury are at liberty to reject the whole of their testimony, unless the same is corroborated by other credible evidence in the case." The criticism of this instruction is that it does not state that the false testimony must be as to a material fact. It is undoubtedly true that in giving a cautionary instruction as to the maxim, "Falsus in uno, falsus in omnibus," it is essential that the jury be informed that the false testimony which will authorize them to discredit the testimony of a witness must be as to facts that are material in the case. The reason of the rule is that "no liability for the legal punishment of perjury results from willful false swearing to an immaterial fact. The full obligation of the compulsory power of a judicial oath does not bear in such case upon the witness." *Peak* v. *People,* 76 Ill. 289. The authorities are uniform, we believe, in holding that, in cases where this cautionary instruction is proper, the jury should be informed that the false testimony must be as to a material fact. *Moresi* v. *Swift,* 15

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Nev. 216; *Pierce* v. *State*, 53 Ga. 365; *Fishel* v. *Lockard*, 52 Ga. 632; *Hall* v. *Renfro*, 3 Metc. (Ky.) 52. But we do not understand that it is necessary to expressly use the word "material," or that a failure to use that particular word makes the instruction erroneous if the same meaning is conveyed by other equivalent expressions. So far as we are able to learn, other expressions of equivalent meaning have been held sufficient. In *People* v. *Ah Sing*, 95 Cal. 657, 30 Pac. Rep. 797, the following instruction was held sufficient: "If you believe that any witness has sworn falsely as to any fact in the case, then you are at liberty to entirely discredit the testimony of such witness." The court said that, "even if appellant's contention be true that the false evidence must be as to material matters, then the instruction still comes within such rule, for it refers to 'any fact' in the case." So, also, in *Hart* v. *Hopson*, 52 Mo. App. 177, an instruction that if the jury believed that any witness had sworn falsely as to any of the facts mentioned in the other instructions, as bearing upon the claim sued on, or the defense thereto, they were at liberty to discredit entirely the testimony of such witness, was held to sufficiently instruct the jury that they were authorized to discredit only witnesses who had willfully sworn falsely to material facts. In the present case the jury was instructed that they might discredit witnesses who are shown knowingly to have testified falsely on the trial "touching matters here involved." The court elsewhere in the charge fairly stated the matters which were involved. The direction that the false testimony must be "touching matters here involved" was equivalent to stating that it must be as to material matters, for, as a matter of course, only material matters were involved.

Error is also assigned on the court's ruling denying the defendant the privilege of introducing certain questions and answers which were contained in the deposition of W. E. Ditmer, which had been taken on behalf of the plaintiff and used on a former trial. The record shows that counsel for defendant announced that he intended to read but a portion of the deposition. Counsel for plaintiff objected unless the entire deposition was offered. The abstract shows the following ruling: "The court permits counsel to read from such deposition such parts thereof as are relevant, and relate to any distinct transaction or transactions connected with the subject-matter under controversy in this action, and requires him to read all of the evidence pertaining to such transaction; leaving it to the discretion of the other party to offer the remainder of the deposition if he so desires." In this ruling we find no error. It is true, the defendant was authorized under the statute to read the deposition in evidence. § 5682, Rev. Codes. But its statutory right did not extend to reading mere excerpts and isolated parts thereof. It is well settled that it is within the discretion of the trial judge to require an entire deposition to be read. The authorities uniformly hold, we believe, that, when a portion of a deposition is permitted to be read relating to a separate transaction, all the evidence that is competent and pertinent to

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the subject must be introduced. A part of the deposition cannot be read, and a part omitted, at the option of the party offering it. All that is competent and pertinent to the transaction should be read, or none. *Kilbourne* v. *Jennings,* 40 Iowa, 473; *Bank* v. *Rhutasel,* 67 Iowa, 316, 25 N. W. Rep. 261; *Prewitt* v. *Martin,* 59 Mo. 325; *Bank* v. *McSpedon,* 15 Wis. 628; *Schwartz* v. *Brunswick,* 73 Mo. 256; *Grant* v. *Penderry,* 15 Kan. 236; *Lanahan* v. *Lawton,* 50 N. J. Eq. 276, 23 Atl. Rep. 476; *Scott* v. *Wagon Works,* 48 Ind. 75; 6 Enc. Pl. & Prac. 586, and cases cited. The order made by the trial court was strictly within the above rule, and deprived the defendant of no right to which it was entitled.

Finding no error in the order denying the motion for a new trial, it will be affirmed. All concur.

(91 N. W. Rep. 436.)

E. I. DONOVAN *vs.* H. D. ALLERT.

Municipal Corporations—Title in Street—Telephone Poles—Franchise from Council—Compensation—Injunction.

The defendants were granted a franchise to construct and operate a telephone exchange in the city of Langdon. The defendants proceeded to perfect such system, and, in doing so, placed two telephone poles in the street in front of plaintiff's lot and residence, and in front of other lots belonging to plaintiff. One of these poles was set two feet from the sidewalk, and directly in front of a walk leading from the sidewalk to the dwelling house. The defendants did not pay plaintiff for such use, nor offer to, nor did plaintiff consent to such use of the street. The streets and alleys of said city were given and dedicated for public use by the original proprietors of the town site. *Held*:

1. That the plaintiff is the owner of the fee in the street to the center thereof, except as conveyed to the public for street purposes.
2. That such use of the street for telephone poles is not a street use, proper, and is a new burden or servitude thereon, inconsistent with the use of the street for travel.
3. That the franchise from the city council to defendants, granting them the privilege of constructing and maintaining a telephone system in said city, did not and could not authorize the occupancy of said street for such purpose, against plaintiff's consent, unless compensation was made to him.
4. That injunction is a proper remedy to prevent such use of the street until the constitutional provision in regard to compensation for taking or damaging property for public use has been complied with.

Appeal from District Court, Cavalier County; *Kneeshaw,* J.

Action by E. I. Donovan against H. D. Allert and others. Judgment for defendants, and plaintiff appeals. Reversed.

Gordon & Lamb, for appellant.

Cleary & McLean, for respondents.

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MORGAN, J. The plaintiff brings this action, and seeks to permanently enjoin the defendants from erecting telephone poles on the streets in front of his lots, situated in various blocks in the city of Langdon, N. D., and particularly described in the complaint, which is, in substance, as follows: That among other lots so described as being affected by the erection of such telephone poles, guy poles, cross bars and wires is the lot on which is erected the dwelling house in which plaintiff resides; that two poles have been erected in the street in front of said lot, and that the erection of said poles at said places interferes with the ingress and egress to his said dwelling house, and interferes with his property rights in said street, and deprives him of light and air to which he is entitled, and that such poles and fixtures render the appearance of said house unsightly, and tend to lessen its financial value and render it unsaleable, and that such poles and fixtures will interfere with the growth of shade trees planted by him in close proximity to said poles; that said poles are 30 feet in height, and are placed in the ground at a distance of 2 feet from the sidewalk, and immediately in line of and in front of the walk leading from the sidewalk to his said dwelling house; that said poles and wires interfere or will interfere with his legal rights in several other lots owned by him in said city; that the defendants were granted a franchise by said city to construct and operate a telephone system in said city by an ordinance duly enacted by the city council thereof, and that said ordinance does not provide for any compensation to be given to owners of property abutting on the streets of said city, nor does it provide that condemnation proceedings shall be instituted and completed before such system is constructed, or at any other time; that the said poles were erected without his consent and without compensation to him, and therefore in violation of § 14 of the constitution of North Dakota, and of § 5933 of the statutes of said state. The demand for relief is that the defendants be temporarily and permanently enjoined from putting up any more poles on the streets on which plaintiff's lots abut, and from operating such telephone exchange, until defendants have made just compensation to plaintiff as required by the laws and the constitution of the state. The defendants answer by denying any damage to plaintiff's propery, and further allege that they have undertaken the construction of a telephone system in the city of Langdon under the provisions of an ordinance of the city council granting them the right to do so under prescribed restrictions, and the poles and wires are erected under the supervision of the committee on streets and alleys, as appointed by said council, and in pursuance of said ordinance. The plaintiff applied for a preliminary injunction to restrain the defendants from proceeding with the erection of such poles and the operating of the telephone system until plaintiff had been duly compensated for damage done to his property. The trial court issued an order to show cause

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why the defendants should not be so restrained. A hearing was had upon such order, based on affidavits presented by the parties. On motion of the defendants, the order to show cause was dissolved and the preliminary injunction refused on the ground that the facts shown did not show that the plaintiff was entitled to the relief sought. The plaintiff has appealed to this court from such order denying his application for a preliminary injunction. The defendants contend in this court that the plaintiff is not entitled to relief by injunction, as he has a plain, speedy, and adequate remedy at law, the defendants not being shown to be insolvent or unable to respond in damages. This question will be considered and decided after a decision of the other question in the case.

The main question involved—the use of the streets of a city for the poles and other equipments of a telephone system, without compensation to the owners of the lots abutting on the streets—is one of difficulty to determine, and one of vast importance and far-reaching consequences. Upon a question of such magnitude, and practical interest to almost every citzen of the state, as well as to almost every municipality, it is to be regretted by this court that counsel deemed it advisable to abandon the privilege of an oral argument, and to submit the questions raised on written briefs. However, the subject of the action is not a new one, and has frequently been before the courts of many jurisdictions. True, the decisions of such courts are not harmonious. Still, every phase of the principle contended for in this case has been affirmed in learned decisions by courts of the highest standing, and likewise disaffirmed by other courts of equal standing, in opinions showing equal ability and learning.

Before entering upon a decision upon the merits, a statement of a few material facts is advisable: The original plat of the city of Langdon, as filed by the original proprietors, dedicates and gives the streets and alleys of said city for public use. The ordinance of said city granting the telephone franchise to the defendants for 15 years is silent upon the subject of compensation to abutting or other lot owners for damages by reason of the occupation of the streets by defendants for telephone purposes, and is silent as to condemnation proceedings therefor. Under section 5956, Rev. Codes, the right of eminent domain may be exercised in behalf of several enumerated public uses; among them being telegraph and telephone lines. The question involved, as considered by this court, is that of the occupation of the streets by the defendants for telephone purposes, and not that of the direct or actual occupation of the plaintiff's lots by said company for said purposes, outside of street occupation. Certain conceded principles of law applicable to the questions involved in this case may be stated: The constitution of this state provides that private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner. The legislature has the power, by general laws,

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to regulate the uses to which the streets may be subjected as against the public. City councils in this state have been granted the power to regulate or prevent the use of the streets for telegraph and telephone poles. § 2148, Rev. Codes. Prior to the adoption of the Code of 1895 the regulation of telephone systems and their construction was governed by § 3025, Comp. Laws, enacted in 1885. A telephone system is classed under the statute as one of public use. § 5956, Rev. Codes. Chapter 35 of the Code of Civil Procedure provides that private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and further provides the means and procedure under which such damages may be ascertained. The plaintiff in this case is the owner of the fee in the lot to the middle of the street, and entitled to the beneficial use thereof, subject to the easement or limited fee of the public in the street for its use for public purposes. In this case the absolute fee of these lots was never in the city, and it has simply an easement or a limited fee therein. In *Railway Co.* v. *Lake,* 10 N. D. 541, 88 N. W. Rep. 461, this court decided "that the public has only an easement in streets and highways, the fee remaining in the original owner or his successor, and that such owner may exercise such acts of ownership thereto as are not inconsistent with the easement." In that case there was no dedication by plat. In the case at bar there was one. However, in construing § 2422, Rev. Codes, which declares the effect of such dedications, we hold that a proprietor who dedicates by plat does not convey an absolute fee to the public, but reserves the whole estate and title, except the limited fee conveyed to the public for the designated and intended use.

The question to be decided on this appeal is, is the plaintiff entitled to recover damages from the defendants by reason of their placing telephone poles on the streets directly in front of his lots and residence? If these telephone poles are lawfully placed on lots which he owns subject to the easement of the public, and none of his rights have been violated, he is not entitled to damages. There must be some infringement upon his statutory or constitutional rights before compensation shall rightfully belong to him. If the city of Langdon and the defendants have pursued the course laid down by the law, and no constitutional right has been been invaded, then the plaintiff has no just cause for complaint in any court. On examination of the question, with this principle in view, we find that the defendants were engaged in constructing this telephone system, and using the streets on which plaintiff's lots abutted, under the sanction of legislative authority. Defendants were granted a franchise to do this work, and the same could not, without difficulty and hardship be completed without placing poles in the streets and alleys of the city. A telephone system is a public benefit to the people, although the objects of its construction in this and all other cases is that of private gain. The fact that the telephone is a public benefit and use does not

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give to the owners any right to occupy or use private property without the owner's consent, unless condemnation proceeding are regularly instituted and prosecuted to judgment. The fee title to the street in front of plaintiff's dwelling house being in the plaintiff, except for street purposes, he owns the lot to the middle of the street, subject to the rights of the public, to the same extent as he owns the portion of the lot on which his dwelling house stands. He alone is entitled to all uses of the lot, except the rights of the public by virtue of the dedication of the part in the street to the public, but is entitled to no use thereof inconsistent with or antagonistic to the purposes and uses for which it was dedicated to the public. The plaintiff's right to the beneficial uses of the street, subject to the rights of the public, is a property right, entitled to the law's protection whenever unlawfully infringed on, and, like all property rights, is within the protection of the constitution. Dill. Mun. Corp. § 656. "The abutter has the exclusive right to the soil, subject only to the easement of the right of passage in the public, and the incidental right of properly fitting the way for use. Subject only to the public easement, he has all the usual rights and remedies of the owner of the freehold." Elliott, Roads & S. p. 519.

This brings us to the real questions in this case: To what public purposes were the streets originally dedicated? Is the use of the street for telephone posts and wires within the purposes of the original dedication to the public by the original proprietors?

The primary use of a street or highway is confined to travel or transportation. Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, or in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in a car drawn by horses or moved by electricity, the object to be gained is moving from place to place. The same idea is expressed by courts and text writers, that "motion is the primary idea of the use of the street." The defendants claim that the use of the streets for telephone poles is within the use contemplated, as it facilitates the transmission of intelligence, and makes intercommunication between persons possible without the use of the street, and thus lessens travel by persons on the streets, and thereby renders travel thereon free from the annoyance and inconvnience of crowded streets. There is force in the contention, and several courts have adopted the view that the use of poles for such purposes is within the purpose of the original dedication, and therefore not a new use nor an additional burden on the street, because such use pertains to travel on the street. That it lessens travel on the street is admitted. That, however, is hardly the test. The question is, does it lessen travel on the street by such means as cause a permanent obstruction of the street for a purpose not within the original dedication? The plaintiff is entitled to free access to his house, and to light and air for his house, without obstruction. If for any public

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purpose inconsistent with the grant to the public of the use of the street, the street is obstructed in front of his lot abutting on such street, such use entitles him to compensation. If within the original purpose, and he is not obstructed in gaining access to his lot or building, and not deprived of light or air, he is not entitled to relief or to compensation. The city had the right to authorize the defendant to construct a telephone system in the manner described, if it did not infringe upon any of the property rights of the plaintiff to the street by virtue of his ownership of the lot. Neither the city council nor the legislature could deprive the plaintiff of compensation for his property rights in such lot, if the telephone poles set thereon are not a use of the street, within the purposes for which the easement was originally conveyed to the public. The legislature cannot deprive the plaintiff of his property rights without his consent and without compensation. The constitution prohibits such taking or damaging of his property, even for public purposes, without first procuring his consent or first compensating him. The legislature may authorize the use of the easement of the public in the street, but not to the damage of the owners of real estate fronting on such street, unless condemnation or consent or compensation is first made or given. The streets of said city were given to the public for public use. What is understood by "public use?" The primary intention and idea of the use of the street was for travel,—moving from place to place in any way that does not interfere with the use of the street for travel in any other way. The manner or mode of travel is not restricted to those known or in use at the time of the dedication, but may be those modes of travel that are the result of modern inventions. The new modes of travel must not interfere with the property rights of the abutting owner, nor with the use of the street in all other ways by the public, as contemplated or existing at the time of the dedication or later. The fact that the statute designates the telephone as a public use does not authorize the use of the streets by it without restriction. If the use of the telephone on the streets interferes with travel, or is inconsisent with the use of the streets for travel, as originally dedicated, or is injurious to the property rights of abutting owners, the legislature may authorize it to be placed on the streets, but cannot in any manner deprive the abutting owner of his property rights, nor deprive him of the right to compel payment for the use or damage of his property.

The courts have frequently passed upon the question whether the use of the streets for telephone purposes is an additional servitude or burden to that understood as a proper street use. Those holding that it is not a street use, in its proper acceptation, are: In *Krueger* v. *Telephone Co.* (Wis.) 81 N. W. Rep. 1041, 50 L. R. A. 298, that court says: "A street may subsist, and the lot owner have the complete use of his adjacent property. Not so if a portion of the street has been permanently taken for poles or other necessary structures for

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a telegraph or telephone line. No one doubts but that private rights are affected by the construction and maintenance of such a line in a way entirely different from the ordinary use of the highway. Nor is there room to dispute the fact that such construction constitutes a permanent occupancy of the land, independent of the public use. This occupancy being for the direct benefit of private corporations, and only for the indirect benefit of the public, how can it be said, with any show of justice, that when land is condemned for a street the public must not only pay for its use, but also for the use of such quasi public corporation as the legislature have given the power to use the highway." In *Eels* v. *Telegraph Co.*, 143 N. Y. 133, 38 N. E. Rep. 202, 25 L. R. A. 640, that court said, in a case involving the use of a rural highway: "We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as a newly discovered method of exercising the old public easement, for the very reason that this so-called new method is a permanent, continuous, and exclusive use and possession of some part of the public highway itself, and therefore cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method, or means of locomotion. * * * Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession,—a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway." In *Telegraph Co.* v. *Barnett*, 107 Ill. 507, 47 Am. Rep. 453, that court said: "In the same sense the construction of a line of telegraph on the highway is an additional servitude to which the fee of the land had not before been subjected. The servitude differs more in degree than in character, and, whether the damages are great or small, the corporation asking for or appropriating to itself the benefit of such new servitude must make just compensation to the owner of the fee." In *Telephone Co.* v. *Mackenzie*, 74 Md. 36, 21 Atl. Rep. 690, 28 Am. St. Rep. 219, the court said: "To what extent, then, does the statute justify the action of the appellant, and protect it from liability? The planting of a telegraph or telephone pole in a highway or street is not a public nuisance, because the legislature has declared that it shall not be, but the general assembly was powerless to subject the reversionary interest in the bed of such highway or street to an additional servitude without making appropriate provision for just compensation to the owner." In *Jaynes* v. *Railroad Co.*, (Neb.) 74 N. W. Rep. 67, 39 L. R. A. 751, that court said: "It is very generally held that telegraph and telephone poles in city streets or rural highways entitle the abutting property owner to compensation. * * * The principle upon which all these cases rest is the sound one that the highway or street is dedicated to the public to pass and repass thereon, and that the erection of poles in the streets by the

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telephone or telegraph companies is a permanent and exclusive occupation of the streets by such companies, to the continued exclusion of the remainder of the public, and to that extent is a continued obstruction of the street." In *Telegraph Co.* v. *Smith* (Md.) 18 Atl. Rep. 910, 7 L. R. A. 200, that court said: "A telegraph or telephone company is subject to the provisions of Const. Md. Art. 3, § 40, which provides that private property shall not be taken for public use without just compensation; and the averment in a bill for injunction that such a company is proceeding or threatens to proceed to construct its lines of poles and wires over complainant's land without his leave, and without paying or tendering him compensation, is sufficient to entitle him to an injunction." In *Telegraph Co.* v. *Williams* (Va.) 11 S. E. Rep. 109, 8 L. R. A. 429, 19 Am. St. Rep. 908, that court said: "It is true that the use of a telegraph company is a public use. That company is a public corporation, as to which the public has rights which the law will enforce, but these public rights can only be obtained by paying for them. The use, while in one sense public, is not for the public generally. It is for the private profit of the corporation. * * * There is no reason in law or in common justice why it should not pay for what it needs in the prosecution of its business." In *Stowers* v. *Cable Co.*, (Miss.) 9 So. Rep. 356, 12 L. R. A. 864, 24 Am. St. Rep. 290, that court said: "A city cannot grant to a telegraph company the right to erect its line along a public street without first making compensation to the abutting property owners, since the line is an additional burden." In *Broome* v. *Telephone Co.*, (N. J. Ch.) 7 Atl. Rep. 851, it is said that "it is enough to say on that head that it does not appear that the road board had any power to authorize any one to set up poles in the land of the highway, and thus subject the land to an additional servitude besides that for which it was condemned." In *Halsey* v. *Railway Co.*, 47 N. J. Eq. 380, 20 Atl. Rep. 859, the court said: "And this principle exhibits in a very clear light the reason why it has been held that the placing of telegraph and telephone poles in a street imposes an additional servitude upon the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence." In *Metropolitan Tel. & Tel. Co.* v. *Colwell Lead Co.*, 67 How. Prac. 365, that court said: "I am clearly of the opinion that such a use of the street is not a street use, and does not come within the terms of the trust upon which the city holds the fee, and that, so far as the rights of the abutting owners are involved, the legislature has no power to authorize plaintiffs to use the street for such purpose." Joyce, Electric Law, § 321, says: "After a careful examination of the cases in which this question has arisen, and of the many thorough discussions contained in the opinions of such cases, and of the rules of law applicable thereto, we are of the opinion that the construction of telegraph and tele-

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phone lines upon the highways or streets is not within the original purposes of the dedication or taking of the same, and that the poles and wires constitute an additional servitude entitling the original owner to compensation." 2 Dill Mun. Corp. § 698a: "On the whole, the safer and perhaps sounder view is that such a use of the street or highway, attended as it may be, especially in cities, with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof." Lewis, Em. Dom., says: "The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, but are entirely foreign to its use. Where the fee of the street is in the abutting owner, he is clearly entitled to compensation for the additional burden placed on the land." Elliott on Roads and Streets, says: "We are inclined to the opinion that such a use constitutes a new burden for which the owner of the fee is entitled to compensation." Croswell on the Law of Electricity (section 110) says: "The use of the highways, however, for the transmission of intelligence, is a use wholly different from public travel. Incidentally, no doubt, it affects somewhat similar objects. * * * The nature of the use, however, is essentially different, and the courts have generally recognized this difference." See, also, as favoring the same principles, *Cable Co.* v. *Irvine* (C. C.) 49 Fed. Rep. 113; *Daily* v. *State*, 51 Ohio St. 348, 37 N. E. Rep. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Cable Co.* v. *Eaton*, 170 Ill. 513, 49 N. E. Rep. 365, 39 L. R. A. 722, 62 Am. St. Rep. 390. The following cases are authority for a doctrine directly the reverse of that enunciated in the cases and text books cited: *People* v. *Eaton*, 100 Mich. 208, 59 N. W. Rep. 145, 24 L. R. A. 721; *Pierce* v. *Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Cater* v. *Exchange Co.*, 60 Minn. 539, 63 N. W. Rep. 111, 28 L. R. A. 310, 51 Am. St. Rep. 543; *Julia Bldg. Ass'n* v. *Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398; *Hershfield* v. *Telephone Co.*, 12 Mont. 102, 29 Pac. Rep. 883; *Magee* v. *Overshiner*, (Ind. Sup.) 49 N. E. Rep. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358.

This brings us to the final question in the case: Is the plaintiff entitled to an injunction? The defendants contend that he is not, because he can resort to an action for damages, and thereby be fully compensated for whatever damages he has or may suffer. That such is the general rule is, without doubt, true. It is also a general rule that a wide discretion is vested in trial courts when granting or refusing preliminary injunctions, and that appellate tribunals will hesitate before interfering with the exercise of such discretion by trial courts. But we have reached a conclusion that the facts of this case place it beyond the application of these ordinary rules. The defendants are proceeding to damage the plaintiff's property without first complying with a mandatory provision of the constitution. That pro-

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vision of the constitution is peremptory that property taken or damaged for public use shall first be paid for, and the legislature has also enacted that payment must precede the taking or damage, and has provided adequate means for establishing the amount of such damages. The taking or damaging of private property for public use without the owner's consent is deemed so serious that payment therefore is a prerequisite to attempting to do so. The defendants have the ultimate right, under their franchise, to use the street for telephone purposes; but payment of damages, actual or consequential, to plaintiff's property, must be first attended to. This does not mean that it may first be appropriated, and paid for at the end of a suit for damages, but means that payment must precede the taking or damaging. Judge Brewer, in *McElroy* v. *Kansas City,* (C. C) 21 Fed. Rep. 261, said: "When the defendant has the ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all those cases the legislature has placed at the command of the defendant means for ascertaining the value of property. In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury to the complainant was great or small, but have contented themselves with holding that, as the defendant had full means for ascertaining such compensation, it was his first duty to use such means, determine and pay the compensation, and until he did so the taking of the property would be enjoined." In *Searle* v. *City of Lead,* (S. D.) 73 N. W. Rep. 913, it is said: "But the framers of our organic law deemed it proper to fully protect the rights of the abutting property owner in the constitution itself, and not leave him to the 'sense of justice' by which a community is supposed to be governed. * * * The constitutional provision is unquestionably a wise and just one, and well calculated to protect property owners from injustice and wrong on the part of municipal or other corporations or individuals invested with the privilege of taking private property for public use, and should be given a liberal construction by the courts in order to make it effectual in the protection of the rights of the citizen." The principles enunciated in these cases are equally as applicable to the facts of the case at bar as to the facts of those cases, and the right to a preliminary injunction was sustained in each of them. "When, however, an action is had for this purpose there must be kept in view that general as well as reasonable and just rule that whenever, in pursuance of law, the property of an individual is to be devested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be in-

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effectual. * * * So, if a statute vests the title to lands appropriated in the state or in a corporation, on payment therefor being made, it is evident that, under the rule stated, the payment is a condition precedent to the passing of the title." Cooley, Const. Lim. p. 654. See, also, *Adams* v. *Railway Co.*, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; *Theobold* v. *Railway Co.*, 66 Miss. 279, 6 So. Rep. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564; *City of Omaha* v. *Kramer*, (Neb.) 41 N. W. Rep. 295, 13 Am. St. Rep. 504; *City of Denver* v. *Bayer*, 7 Colo. 113, 2 Pac. Rep. 6; *Church* v. *School Dist.*, (Wis.) 13 N. W. Rep. 272.

Under these cases, and the principles there sustained, we hold that the occupancy of the plaintiff's property for the purposes intended was a violation of the rights of the plaintiff guarantied him by the constitution and the statutes, for the prevention of which a preliminary injunction should have been granted. The possession taken for such purposes was in the nature of a continuing trespass. A multiplicity of suits must necessarily follow before adequate compensation could be awarded for such continued invasion of plaintiff's property rights. In view of these considerations, the remedy at law would be inadequate. 1 High, Inj. § 708; *Krueger* v. *Telephone Co.*, (Wis.) 81 N. W. Rep. 1047, 50 L. R. A. 298. It is contended that to grant preliminary injunctions in such cases will seriously retard public improvements, and delay the advantages to be derived therefrom to the public. We do not understand that it would to any serious extent. If those desiring to use private property for public use will follow the provisions of the law and the constitution, before endeavoring to use such private property, the delays or difficulties will be but slight.

Our conclusion is that the placing of the poles in the street in front of plaintiff's dwelling house in this case is an occupancy of the street inconsistent with the dedication of the street for the use of the public for travel; that it constituted an additional burden or servitude upon the street, not within the purposes of the dedication; that the public has an easement in the street for travel and passage thereon by any means not inconsistent with the rights of abutting property owners; that the placing of these poles in this street is an interference in some degree with travel on the street, and also encroaches upon the plaintiff's right to the free and unincumbered use of such street for all purposes.

We are not convinced by the argument advanced that the rights of the public and of abutting owners should be subjected to the occupancy of the streets for all public purposes under the new appliances of modern invention, which greatly facilitate communication between citizens of the same city or citizens of different cities. If the persons utilizing these new appliances were the only ones whose rights and interests were to be considered, there could be but one answer to the demand for a liberal construction of the terms of the grant for public use. But on the one hand are the interests of

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those asking for the unrestricted use of the streets for intercommunication, and the unlimited use of the streets for all such purposes without compensation. On the other hand is the demand of the abutting property owner that his property be not sacrificed to such uses without compensation. His demand is safeguarded by the constitution expressly providing that his property shall not be taken or damaged without his consent and without compensation. We think the plaintiff's rights are within the provisions of the constitution. We are aware that plaintiff's damages cannot be large in the present case. But if 2 poles may be erected on this street in front of his residence, why not 20? We cannot sanction the violation of a constitutional provision because the damages may seem insignificant. The constitutional protection is not to be meted out in cases where pecuniary damages are large, and denied if they are small. The protection should follow a violation of any right therein defined. Some of the cases cited pertain to setting of poles in rural highways for telegraph purposes. A distinction is apparent between the use of a rural highway and a street, and is sometimes claimed between the use of the telephone and the telegraph. The cases are cited as analogous in principle to the case at bar. The decision, however, is not intended to cover any questions save the one involved, and that is the use of the telephone as set forth in the pleadings in this case, and any case cited not strictly in point is cited as argumentatively sustaining the contention advanced by plaintiff.

The order of the district court refusing a preliminary injunction is reversed, and that court is directed to grant the temporary relief demanded in the complaint. All concur.

(91 N. W. Rep. 441.)

J. B. STREETER, JR., COMPANY *vs.* MARIT FREDRICKSON, *et al.*

Adverse Possession—Possession of Claimant's Grantor—Tacking—Statutory Right—Payment of Taxes—Necessity.

Section 3491a, Rev. Codes 1899, being chapter 158, Laws 1899, which provides that all titles to real property of persons who have been or hereafter may be in the adverse possession thereof for ten years, and shall have paid all taxes legally assessed thereon, shall be valid, construed, and *held*, that the doctrine of tacking possessions, which is generally applicable under statutes of limitation for the recovery of real estate, is not applicable under this statute, and that said statute does not permit one claiming title thereunder to make out an otherwise insufficient adverse possession and payment of taxes by adding to his possession the prior adverse possession of his grantor, or to avail himself of the payment of taxes by his grantor. It is *held*, in an action to quiet title and determine adverse claims to certain real estate to which defendant claims title under a void tax deed, accompanied by adverse possession and payment of taxes for only eight years, that the trial court properly quieted title in the plaintiff.

Appeal from District Court, Nelson County; *Fisk*, J.

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Action by the J. B. Streeter, Jr., Company against Marit Fredrickson and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

C. N. Frick and *Cochrane & Corliss,* for appellants.

Tracy R. Bangs, for respondent.

YOUNG, J. This is an action to quiet title and determine adverse claims to certain real estate situated in Nelson county. The title upon which the plaintiff relies was acquired through a series of conveyances, commencing with the patent from the United States government, which was issued July 10, 1883. It is conceded that the plaintiff's title and right of possession is perfect, unless it has been acquired by the defendant by adverse possession under the provisions of chapter 158, Laws 1899. The defendant Marit Fredrickson claims that the plaintiff's title has been forfeited, and that her claim of title, which is based upon a tax deed, accompanied by adverse possession and payment of taxes thereunder, has become perfect and paramount. The facts were stipulated at the trial. The tax deed referred to was issued to C. M. Howlet on February 16, 1887, for the taxes of 1883. On May 11, 1887, Howlet conveyed to A. M. Tofthagen. On April 20, 1892, Tofthagen conveyed to the defendant Marit Fredrickson. It is stipulated that Tofthagen, the defendant's grantor, was in actual, open, adverse, and undisputed possession of the real estate in controversy from May 11, 1887, to April 20, 1892, and paid all taxes and assessments on said real estate during said period; further, that the defendant Marit Fredrickson continued such possession, and that the same was undisputed up to March 8, 1900, when this action was commenced; and that she paid all taxes and assessments charged against said land during her occupancy. The combined possession of the defendant and her grantor extended over 13 consecutive years. Neither the defendant nor her grantor, however, was in possession of the premises or paid taxes for the full statutory period of 10 years. The possession of Tofthagen covered about five years, and that of the defendant Fredrickson about eight years. The defendant Tofthagen has an unsatisfied mortgage on the premises, executed by the defendant Marit Fredrickson. It is conceded that the tax deed referred to is void, and it is relied upon by the defendants merely as color of title, and in connection with adverse possession and payment of taxes. The trial court held, as matter of law, that the plaintiff is the owner in fee simple of the land in question, and that neither of the defendants has any interest therein. The defendants have appealed from the judgment quieting title in the plaintiff, and assign error upon the courts's conclusion of law.

The statute upon which the defendants rely to defeat plaintiff's title and establish title in Marit Fredrickson (chapter 158, Laws 1899; section 3491a, Rev. Codes 1899) reads as follows: "All titles to real property vested in any person or persons who have been or

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hereafter may be in the actual, open, adverse and undisputed possesion of the land under such title for a period of ten years and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." Plaintiff's counsel contend that the facts of this case do not bring it within the provisions of the statute just quoted. In this view we fully concur. This statute was before this court in *Power* v. *Kitching*, 10 N. D. 254, 86 N. W. Rep. 737. We then enumerated, in a general way, certain conditions which must concur to render the statute available to one who claims title under its provisions. "Under this statute title is not acquired until each of the three prescribed conditions are fully met: First, the claimant must be vested with some sort of title; second, he must occupy the land, under claim of title thereto, openly, adversely, and exclusively for a period of ten years; finally, the claimant must pay all taxes assessed against the land for such period." In the case at bar the adverse possession of the claimant does not fill out the statutory period of 10 years. Neither has she paid taxes assessed againt the premises for that period. As already stated, her possession and payment of taxes covered but eight years.

Counsel for defendants contend, however, that the doctrine of tacking possessions is applicable, and that for the purpose of making out a full compliance with the statute the defendant may resort not only to the prior adverse possession of her grantor, but that she may also have the benefit of his payment of taxes. In our opinion, the doctrine of tacking possessions is not permissible under this statute. This question was not involved in *Power* v. *Kitching*, supra. In that case the claimant had been in possession and had paid taxes for the full statutory period of 10 years. We are agreed, however, that the general conclusion announced in that case that a claimant under this statute must have been in adverse possession for 10 years, and paid taxes for that period was a proper interpretation of the requirements of the statute, and should be adhered to. One who seeks to establish title to real property in himself and to defeat the true title of another by the aid of a statute of limitation, must bring himself clearly within its terms. Courts are without authority to expand such statutes to include cases not covered thereby. The following rule of construction, voiced by the supreme court of Wisconsin in *Sydnor* v. *Palmer*, 29 Wis. 226, meets our approval: "Statutes of this nature, which operate in restraint of the true title, or make a certain kind of possession effectual for that purpose, if they are not to be contrued strictly, yet ought not to be construed so liberally as to include within them any case not fairly within their words. The courts have no power of addition or amendment by which they can extend the operation of the statute, or adapt it to cases not provided for. The party whose title is to be destroyed or remedy barred may properly stand on the letter of the statute, and insist on a strict compliance with its conditions." See, also,

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Wilson v. *Henry,* 35 Wis. 241. By the language employed in the statute under consideration,—and it is not ambiguous,—the legislature of this state extended the benefit of its provisions not to all persons indiscriminately, but to certain persons; that is, to persons who have been or may hereafter be in the actual, open, and undisputed possession of land for 10 years, and who shall have paid all taxes and assessments legally levied thereon. It is the titles of persons complying with these conditions which are declared good and valid in law, and the titles of no other persons. There is no language in the statute which can be construed as extending the benefit of its provisions to persons or in aid of titles other than those thus described. It will be conceded that the doctrine of tacking possessions, which counsel for defendants invoke,—and it is an ancient doctrine,—has been applied by the courts to almose all statutes of limitations for the recovery of real property. It was recognized by the common-law courts of England as permissible under 21 Jac. I, c. 16, 1623, entitled "An act for limitation of actions, and for avoiding of suits in law." "This statute has been the model of all the legislation on the limitation of actions for the recovery of land in this country. It was generally adopted here during the colonial period, and, though now superseded by more modern legislation, the rules of construction laid down by the courts with regard to it are held to govern the statutes which have been modeled upon it and taken its place." Sedg. & W. Tr. Title Land, § 724. "And wherever it has been superseded by other acts of limitation which do not esesntially vary it, these are generally construed as the statute of James, and the other acts founded upon it have been construed." Busw. Lim. § 10; *Walden* v. *Gratz,* 1 Wheat. 292, 4 L. Ed. 94. And it may be said that practically all statutes of limitations of this country relating to the recovery of land permit the tacking of possessions, as did the parent English statute. While this is true, the fact cannot be overlooked that the doctrine of tacking possessions is always subordinate to the particular limitation statute upon which a claimant relies to establish his title. It is by virtue of the statute alone that a claimant is authorized to assert that the true title has been forfeited, and that his defective title has ripened into perfect title. Where the phraseology of a statute of limitation is such as to permit the application of the doctrine of tacking possessions, a claimant thereunder may always avail himself of the possession of his grantor, or those in privity with him, to make out his otherwise insufficient period of adverse possession. But, if the particular statute relied upon does not, under a proper construction, permit such tacking of possessions, it matters not how general or universal the doctrine may be under other statutes. The statute under consideration is entirely unlike the statutes of limitations common in most of the states, and also the 20-year limitation statute of this state. In fact, it is so dissimilar that its identity as a statute of limitations is almost obscure. The cases cited in support of appellant's contention are based upon

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statutes so unlike that which we are considering that we deem them not in point. The 20-year limitation statute of this state (section 5188, Rev. Codes) reads as follows: "No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action." Under the statute just quoted, and all similar statutes, the decisive question in determining whether the bar is complete as against a claimant out of possession is whether he, his ancestor, predecessor, or grantor, has been in possession within 20 years prior to commencing his action. In determining this question courts are frequently met with the fact that a number of persons have been in adverse possession successively. It is clear that, to make the bar of statute complete as against a claimant out of possession, there must have been a continuous adverse possession for the full statutory period. When no privity exists between the severe adverse occupants, the continuity of possession is broken at each new entry, for the reason that the law presumes that the true owner is in possession. When, however, there is privity of possession between the occupants, the courts have uniformly held that the one holding adversely may tack the possession of his predecessor to his own, and thus a continuous adverse possession is made out against the claimant out of possession. The entire scope of this so-called "doctrine of tacking" is, however, as will be seen, not to determine whether the occupant has been in possession for any fixed period of time, but is to determine whether the claimant out of possession has in fact or in law been in possession within the statutory period, so as to entitle him to maintain his action. In other words, it is merely a uniform rule adpoted by the courts for determining whether a claimant out of possession when his action is commenced has been in possession at any time within the 20-year period. If no privity is found to exist between the successive disseisors, and the last occupant has not held adversely for the full statutory period, the bar is not complete, as the law presumes that the possion of the land returns to the true owner at each change of possession, when there is no privity between the several occupants. When, however, there is privity of possession, and it has continued for the statutory period, the bar is complete, for the very plain reason that the claimant out of possession has not, in that event, been in possession within the statutory period. The statute upon which the defendants rely (section 3491a, Rev. Codes) does not provide that no action shall be maintained to recover real property or the possession thereof unless the plaintiff shall have been in possession within 10 years prior to the commencement of the action. Neither does it make possession by the plaintiff at any time a prerequisite to the maintenance of his action. If it did, the question of the plaintiff's possession and subsequent right to maintain his action

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would be in issue, and to determine the same the doctrine of tacking possessions would be applicable. This statute, on the contrary, instead of presenting any question as to the possession of the claimant out of possession, deals entirely with persons in possession, and extends the benefits of its provisions to such persons by boldly declaring that their title is good if they have been in the actual, open, adverse, and undisputed possession of the land for 10 years, and have paid all taxes and assessments legally levied thereon. The inquiry under this statute is not whether a claimant out of possession has been in possession at any time within 10 or 20 years, or at any time, but is merely whether the party relying upon the statute has been in the adverse possession of the premises and has paid the taxes legally levied thereon for the statutory period. If he has, the benefits of the statute are extended to him; otherwise not. Statutes quite similar to that under consideration are found in Colorado (section 1694, Gen. Laws Colo. 1877) and in Illinois (Rev. St. Ill. 1881, c. 83, § 6). The protection of the statutes of both of these states extends not alone to those who have been in possession and paid taxes for the full period, but by express language they authorize those in adverse possession to add to their possession the adverse possession and payment of taxes of their predecessors, ancestors, and grantors in order to fill out the statutory period. This, as we have seen, our statute omits. See, also, section 3199, Rev. St. Tex. While adopting other features of the statute referred to, our legislature wholly omitted the provision last referred to. We must assume that the omission was intentional. The legislature saw fit, in the statute under consideration, to extend its benefits only to persons who have been in possession for 10 years, and have paid the taxes during such period. This being true under the rule of statutory construction, we are without authority to extend its operation by construction to protect the titles of persons who do not come within its provisions.

The defendants must fail for another reason. The statute upon which they rely makes the payment of taxes by the claimant an essential condition, and one which is prerequisite to the perfecting of title thereunder. It is as necessary to the claimant as his adverse possession; in other words, payment of taxes and adverse possession must concur. It would, therefore, not avail a claimant under this statute to establish a sufficient adverse possession without at the same time showing a complete compliance with the requirement as to the payment of taxes. In this case, as has been stated, the defendant, who is seeking the benefit of the statute, has paid taxes for but eight years. Therefore, if it were conceded that she may not avail herself of the prior adverse possession of her grantor, she still falls short in one of the conditions which must exist to give her the benefit of the statute; that is, in payment of taxes. This is fatal to the assertion of her claim of title under this statute. There is no doctrine of tack-

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ing payment of taxes which can be invoked. The feature requiring payment of taxes is modern, is found in but few states, and is peculiar to special statutes fixing short periods of limitation. Where the payment of taxes is thus made a condition for acquiring title by adverse possession, the claimant is held to a strict performance of the condition, and it is not enough that the taxes have been paid during the statutory period. It must be made to affirmatively appear that they were paid by the claimant, or on his behalf. On this point see the following cases, decided under the statute of Illinois, which also requires the payment of taxes: *Timmons* v. *Kidwell*, 138 Ill. 13, 27 N. E. Rep. 756; *Dawley* v. *Van Court*, 21 Ill. 460; *Fell* v. *Cessford*, 26 Ill. 525; *Jayne* v. *Gregg*, 42 Ill. 413; *Irving* v. *Brownell*, 11 Ill. 403; *Irwin* v. *Miller*, 23 Ill. 348.

It follows from what we have said that the judgment of the district court quieting title in the plaintiff was proper, and it is accordingly in all things affirmed. All concur.

(91 N. W. Rep. 692.)

In re OLMSTEAD.

Attorneys—Admisson to Bar—Revocation.

An order of this court was made and entered on March 26, 1902, admitting the respondent, George C. Olmstead, to practice law at the bar of this state. This proceeding was instituted to vacate said order of admission. *Held*, Upon the grounds and for the reasons stated in the opinion, that said order of admission should be revoked, and the same is revoked and set aside.

In the matter of the admission of George C. Olmstead to the bar. Order of admission revoked.

J. H. Bosard, for State Bar Association.

George C. Olmstead, pro se.

WALLIN, C. J. In this matter, J. H. Bosard, Esq., an attorney of this court, appears in behalf of the State Bar Association, and the respondent, Mr. George C. Olmstead, appears in his own behalf. The undisputed facts presented by the record, briefly stated, are as follows: The respondent, George C. Olmstead, was regularly admitted and licensed to practice law in the state of Iowa by the supreme court of that state at a term of court held in May, 1894, but was later, on certain accusations and charges, disbarred by the district court of Hamilton county, Iowa, at a term of court held in said county in the month of April, 1899. The judgment of disbarment, among other things, embraces the following recital: "That the first, second, third, fourth, fifth, sixth, and eleventh of said charges are shown to be true, and that the defendant is guilty thereof, by the proofs offered by the plaintiff, and that all fifteen of said charges made by said committee this court finds to be true, by reason of the default of the defendant in not making any answer and

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defense thereto after having been duly and legally served with a copy of the same." Pursuant to the foregoing findings, said district court of the state of Iowa entered its judgment revoking and cancelling the respondent's certificate and license as an attorney, and disbarring him from the practice of law in the state of Iowa. Later, and on the 26th day of March, 1902, the respondent was admitted to the bar of this state by an order of this court made and entered in open court on said day. The respondent's application to this court for admission to the bar of this state was made under section 424 of the Revised Codes of 1899, and as a basis for such application the respondent presented to this court his license as an attorney of the state of Iowa, embracing a certificate of his admission to the bar of the state of Iowa; and this certificate was supported by an affidavit made by S. G. Cady, Esq., an attorney of this court, setting forth "that said Geo. C. Olmstead is at least twenty-one years of age, of good moral character, and a resident of the state of North Dakota; that he was admitted to practice law by the supreme court of the state of Iowa at the May term of said court, in the year A. D. 1894; and that he practiced the said profession in the said state of Iowa for more than one year immediately succeeding such admission to the bar by the supreme court of said state." It also appears to the satisfaction of this court, and the fact is not questioned, that said affidavit was made by Mr. Cady at the solicitation of the respondent, and was not made until after the respondent had shown to the affiant certain certificates of his good character, and made certain assurances which induced the affiant to believe that the respondent was then a man of good moral character, and was then and at that time a member of the bar of the state of Iowa; nor did the respondent at any time before his said admission to the bar of this state reveal to Mr. Cady, or make known to this court, the fact that he was not then a member of the bar of the state of Iowa, or that he had been, in a proceeding brought for that purpose, disbarred from practice by a competent court of the state of Iowa.

The foregoing facts are undisputed, and were brought upon the record pursuant to an order to show cause issued by a judge of this court, and served upon the respondent. Upon the return day the respondent did not appear in this court personally or by attorney, but in lieu thereof filed a brief in this court, which quotes said section 424 of the Revised Codes in full, which section reads: "Any person becoming a resident of this state after having been admitted to the bar in any of the state of the United States, in which he has previously resided, may at the discretion of the court be admitted to practice in this state without examination or proof of period of study as hereinbefore provided, on proof of the other qualifications by this article required and on satisfactory proof that he has practiced law regularly for not less than one year in the state from which he comes after having been admitted to the bar according to the laws of such state." The respondent says in his brief that said

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section "does not require nor specifically state that the applicant for admission on certificate is, at the time he makes application, practicing in good standing at the bar from which he comes." It will be conceded that said section does not, in terms, declare that an applicant for admission to the bar on certificate shall be required to show that he is at the time of such application a member of the bar of the state in which he was admitted to practice, but such, clearly, is the plain meaning of the section. The applicant under that section bases his right to be admitted, not upon an examination touching his professional attainments, but solely upon the fact of his admission to the bar of a sister state. This implies that he has been examined, and that a court of competent authority has deemed him to be a proper person to be admitted to the bar as an attorney at law; and, under section 424, the court in this state, relying upon the original certificate of admission, does not subject the applicant to an examination touching his legal attainments. But another section of the Code (section 421) has a bearing in all cases and to all classes of applicants for admission to the bar of this state, including those who apply for admission on certificate. That section requires that the applicant must be "of good moral character," and in this court, by a rule of court (rule 40), the candidate who applies for admission on certificate is expressly required to furnish proof that the applicant is of "good moral character." This proof was furnished in this case by the usual affidavit made by an attorney of this state. But it now appears that this affidavit of character was procured by the solicitation of the respondent, and that the same was made in reliance upon the representations of the respondent, which representations were to the practical effect that respondent at that time was a member of the bar of the state of Iowa, and when made the affiant had no knowledge or intimation that respondent was not such, or that he had been disbarred for professional misconduct which involved moral turpitude, or at all. Moreover, the proof submitted to this court as a basis for respondent's admission to the bar was in itself a gross and inexcusable act of deception practiced upon this court. The papers submitted with the application, on their fact and by their terms, purported to show and were intended to show that the respondent was then a reputable member of the bar of the state of Iowa, whereas he was not such, but was then in the condition of having been disbarred from practice in that state. It therefore appears that at the time the order of this court was made, admitting the respondent to practice law in this state, the respondent was ineligible, and not entitled to apply for admission on certificate, under the laws of this state. His admission was obtained by a fraudulent suppression of facts which were pertinent to his application for admission, which facts would have been decisive against it if the same had been made kown to the court at any time before the order of admission was made. See *Lowenthal's Case*, 61 Cal. 122.

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Upon the state of facts narrated, we deem it just and proper that the license of the respondent to practice law in this state should be revoked, and, to accomplish such purpose, an order will be entered vacating and setting aside the order of this court, dated March 26, 1902, admitting the respondent to the bar of this state as an attorney and counselor at law. All the judges concurring.

(91 N. W. Rep. 943.)

STATE *ex rel* F. T. GRANVOLD *vs.* E. F. PORTER.

Nominees—Official Ballot—Split Convention.

In determining which of two sets of nominees of a split political convention are entitled to have their names placed upon the official ballot as the party nominees, the inquiry of the court should be limited to ascertaining which of the conventions from which the nominating certificates emanate is the regular one, and should not extend to an examination of political methods and tactics further than is necessary to ascertain the identity of the regular party convention.

Delegates Not Voting.

Where delegates who are entitled to sit in a party convention are present, but refrain from voting, they cannot, by so doing, invalidate the action taken by a majority of those who do vote. In such case, their silence is deemed to be an assent to the action taken by the majority.

Political Convention Judge of its own Members.

A political convention is the judge of the qualification of its members, and its determination of contests between claimants for seats therein is conclusive.

Withdrawal of Delegates.

The voluntary withdrawal of delegates from a political convention which has been regularly organized does not deprive those who remain of the power to act, or destroy the identity of the convention. In such assemblages the presence of a majority of those entitled to participate is not necessary to constitute a quorum, and those not present are presumed to assent to the action taken by the majority of those who are present and vote.

Minorty Cannot Withdraw and Hold a Valid Convention.

A minority of the lawful delegates to a political convention cannot withdraw from the regular convention, and unite themselves with persons whose credentials have been rejected by the convention, and then successfully claim that they constitute the legal party convention.

Majority Convention Regular.

It is *held*, on the facts stated in the opinion, that the convention held in the Thirty-Fourth legislative district on August 9, 1902, which nominated what is knows as the "Fox Legislative Ticket," was the regular convention of the Republican party, and that the nominees of said convention are entitled to have their names placed upon the official ballot as the nominees of that party.

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Application by the state, on the relation of F. T. Granvold, for a writ of mandamus to E. F. Porter, secretary of state. R. A. Fox and others intervene. Writ issued.

McDermont & Coger and *Cochrane & Corliss,* for plaintiff.

Oliver D. Comstock, Atty. Gen., for defendant.

Morril & Engerud, A. M. Christianson, and *L. N. Torson,* for interveners.

YOUNG, J. Upon the application and affidavit of the relator, F. T. Granvold, an alternative writ of mandamus issued out of this court, directed to the Honorable E. F. Porter, secretary of state, commanding him to certify the name of said Gronvold to the county auditors of Pierce and McHenry counties as the nominee of the Republican party for senator for the Thirty-Fourth legislative district, which embraces said counties of Pierce and McHenry, and also to certify the names of James T. Moffet, R. J. Brock, and Benjamin Hammond as the nominees of the Republican party for representatives for said legislative district, or to show cause to this court why the command of the writ had not been complied with. The controversy arises out of a split in the Republican legislative convention, which resulted in two sets of nominess being certified to the secretary of state; both certificates being in due form, and purporting to contain the names of the nominees of the Republican party. The convention, it is conceded, was duly called to be held at the courthouse in Rugby, in Pierce county, at 3 o'clock p. m. on August 9, 1902, and it was during the progress of the convention held at that time and place that the split occurred, and the two rival conventions were held, and the nominations in question made. It is also conceded that Pierce county was entitled to be represented in said convention by seven delegates, and that McHenry county was entitled to a representation of eight delegates; further, that both of said counties held conventions for the purpose of selecting delegates; that the seven delegates selected to represent Pierce county were present at the convention, and, so far as this proceeding is concerned, no dispute exists as to their right to sit, or as to the personnel of the delegates. The fact also appears, without dispute, that seven of the delegates from McHenry county have at no time been in controversy, or the personnel of said seven delegates in dispute. The only controversy as to any of the delegates was in reference to the eighth delegate from McHenry county, and it was over this dispute that the convention divided. One faction, led by R. A. Fox, of McHenry county, who was a candidate for senator from this district, claimed that Charles D. Donnelly was the eighth delegate, whereas the relator, Gronvold, a resident of Pierce county, and also a candidate for the same position, claimed that one George E. Bowers was the eighth delegate.

The affidavit of the relator, upon which the alternative writ was issued, among other things, states that the McHenry county

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convention "duly elected to said legislative convention eight delegates, and that one of said eight delegates so elected was George E. Bowers"; that said delegates all assembled at Rugby for the purpose of holding the said Republican legislative convention, except the said George E. Bowers, who had theretofore given his proxy to one George H. Stevens; that the chairman and secretary of the McHenry county convention did not make out certificates showing the election of said eight delegates until the 9th day of August, 1902, which was the day the legislative convention was held, when said chairman and secretary were induced by R. A. Fox to sign credentials containing only six of the names of said eight delegates, upon the assurance of said Fox that he had the right to substitute in place of the other two delegates, if he so desired, the names of other persons as delegates in their places; that said credentials were delivered to him in that condition, and that thereafter the said Fox inserted or caused to be inserted therein as the other two delegates from McHenry county the name of one delegate who had been lawfully elected, and also the name of one Charles D. Donnelly in place of the said George E. Bowers, and that said Charles D. Donnelly was never elected by said McHenry county convention; that said Fox was a candidate for the office of state senator at the time of inserting the name of said Donnelly in place of that of George E. Bowers; that the seven delegates from Pierce county were opposed to said Fox, and in favor of affiant, Gronvold, and that the said George H. Stevens, who held the proxy of said George E. Bowers, was likewise in favor of Gronvold, and opposed to Fox; that said Fox presented said credentials to the said legislative central committee, and deceived said committee into believing that said Charles D. Donnelly had been selected as delegate from said McHenry county, instead of said Bowers; that, upon the "right of said Donnelly to be seated as a delegate in said convention being challenged by said Stevens, said committee referred the question whether said Donnelly or said Stevens was entitled to a seat in said convention to said seven other delegates from McHenry county, all of whom were favorable to said Fox for senator; that the said Fox claimed before said committee the right to substitute said Donnelly in place of the said Bowers; and that his right so to do was recognized by said seven other delegates from McHenry county." The affidavit further states that the seven concededly lawful delegates from McHenry county united with Donnelly and nominated the following persons, to-wit: For senator, Robert A. Fox; for representatives, O. A. Knudtson, Thomas H. Oksendahl, and T. Welo,—and that said Stevens and said seven delegates from Pierce county "in no manner participated in said pretended convention," but that, when it became apparent that the seven delegates from McHenry county were determined to act with said Donnelly, they assembled at the same time and place, and in the presence of the seven lawful delegates from McHenry county, and organized a convention, and by the unanimous

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vote of all the delegates from Pierce county, and with said Stevens, who held the proxy of George E. Bowers, nominated the following persons as the Republican candidates for senator and representatives of said Thirty-Fourth legislative district, to-wit: For senator, F. T. Gronvold; for representatives, James T. Moffet, R. J. Brock, and Benjamin Hammond. The affidavit further states that certificates of nomination were made out by the respective secretaries and chairmen of both of said conventions, and filed with the secretary of state.

The secretary of state, in answer to the allegations of the alternative writ, admitted that a Republican convention was duly called and held at the time and place allleged, and that two sets of certificates of nomination, both in due form, were filed in his office, but alleged that he had no knowledge as to which of said certificates contained the rightful nominees of the convention, and that he had no power or authority to determine the question, and for that reason was unable to perform his duty with respect to placing the names of the Republican nominees upon the official ballots, and therefore prayed to the end that the rights of the conflicting claimants might be determined, that R. A. Fox, T. Welo, O. A. Knudtson, and Thomas H. Oksendahl be impleaded, and required to answer the allegations of the writ and set forth any claims they might have to said nominations. In pursuance of such request the nominees of what may be termed the "Fox Convention" intervened and answered, alleging, among other things, that the delegates from McHenry county were, by a resolution duly adopted by the convention, instructed and directed to vote for and use all honorable means to secure the nomination of R. A. Fox as Republican candidate for senator for said district, and T. Welo as one of the Republican candidates for the house of representatives for said district; further, that said convention did, by resolution duly adopted, authorize and empower the said R. A. Fox to select any eight persons he desired as delegates to the legislative convention, and thereby committed and intrusted the selection of said eight delegates to said Fox; that said Fox did thereupon choose and name eight delegates, one of whom was Charles D. Donnelly; that George E. Bowers was not among the number of those so chosen by said Fox; that thereafter the chairman and secretary of the McHenry county convention executed credentials for the delegates so chosen, which credentials included the name of Charles D. Donnelly, and did not include the name of George E. Bowers. The answer of the interveners further alleges the nomination of the interveners, and the filing of their certificates of nomination with the secretary of state, and prays that a peremptory writ of mandamus be issued, commanding said secretary to certify their names as the regular Republican nominees.

Under the laws of this state, the privilege is accorded to political parties which have cast 5 per cent. of the total vote cast for member of congress at the next preceding election to have placed upon the

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official ballot one nominee for each office. This right is secured under the statute by filing with the secretary of state or county auditor, as the case may be, a certificate of nomination in the form required by the statute, executed by the chairman and secretary of the political convention making the nominations certified. In case two or more certificates are filed with the secretary of state, both or all purporting to represent the same political party, and containing the names of different nominees for the same office, the power of the courts may be invoked for the purpose of determining which, if any, of the persons so certified are the rightful party nominees. *State* v. *Falley,* 9 N. D. 450, 83 N. W. Rep. 860. Prudential considerations require, however, that, in determining this question, judicial inquiry should be limited to ascertaining which of the conventions filing certificates is the regular one, and should not extend to examining into the methods or tactics employed by political factions either in caucuses or conventions, further than is absolutely necessary to determine the identity of the party convention, and thereby decide who are the true party nominees. We have in this case a party convention duly called, and a division of the same into two conventions, both held at the same time and in the same room. The question submitted for our determination is which, if either, of these two conventions was the regular Republican legislative convention of the Thirty-Fourth legislative district. The evidence submitted upon the questions at issue is contained in 185 affidavits, which are almost equally divided between the two factions. As to many facts which it is plain were equally within the knowledge of the affiants, and as to which we cannot indulge the charitable belief that the witnesses were mistaken, the affidavits are squarely contradictory. This condition exists as to so many affidavits and so many facts that we are driven to the conclusion that the affidavits were either carelessly signed, without reading or considering their contents, or that the affiants had but slight regard for the obligation of their oaths. We are able, however, to base our decision upon facts which are either not in dispute, or which are amply sustained by the affidavits of both parties.

We will first turn to the McHenry county convention. It is claimed by the relator that George E. Bowers was elected by the convention as the eighth delegate. The interveners contend that the only action taken by the convention was to authorize R. A. Fox to select the delegates, and that he selected Charles D. Donnelly, and did not select Bowers. It is conceded that the convention passed a resolution instructing its delegates to the legislative convention to vote for and use all honorable means to secure the nomination of Fox for state senator, and that said convention, also, by resolution duly adopted and entered in its minutes,—and this fact is not disputed,—authorized and empowered said Fox to choose the delegates to said legislative convention. The fact is established by a preponderance of the evidence that subsequent to the passage of such resolution a list of eight names was placed in the hands of the

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secretary of the convention, and the same was read to the convention, and that said list contained the name of George E. Bowers as one of the eight delegates and did not contain the name of Charles D. Donnelly. The further fact is indisputably established, however, that the convention took no action upon the names so read. No motion was made to elect said persons as delegates. Neither does it appear that the convention desired to act upon the selections made by Mr. Fox. The resolution adopted by the convention intrusted the selection of delegates entirely to him, and contained no language which required him to report to the convention the names of the persons chosen by him. The affidavit of the relator, upon which the alternative writ was issued, stated that the eight delegates from McHenry county were elected by the convention. In this the relator was clearly mistaken, if he meant that the convention voted upon the delegates, or took any affirmative action upon the names; for it clearly appears from numerous affidavits, including a large number of those filed by the relator, that the only action taken by the McHenry county convention in reference to selecting delegates was to authorize Mr. Fox to select them. Subsequent to the convention, Stevens, under the belief that Bowers was a duly accredited delegate, procured his proxy. Mr. Fox, for reasons satisfactory to him, and with which we have no concern, concluded that he did not want Bowers as a delegate, and accordingly caused his name to be omitted from the credential which were executed by the chairman and secretary of the convention, and substituted therein, in lieu of said Bowers, the name of Charles D. Donnelly, whose name was not read or mentioned before the McHenry county convention. The credentials were executed on the morning of the 9th of August, and were prepared under the direction of Mr. Fox. At the time they were signed they contained but six names. They were left with Mr. Fox by the chairman and secretary with authority to complete the same, upon his assurance and the understanding that he had authority to choose the delegates. This he did by inserting one name which was read to the McHenry county convention, and the name of Charles D. Donnelly. The credentials in question, omitting the names of the delegates and the signatures of the chairman and secretary, are as follows: "Towner, McHenry County, N. D., July, 1902. This is to certify that at the regular Republican county convention held in Towner, McHenry county, North Dakota, on July 21st, 1902, the said convention delegated the power and authorized Robert A. Fox to select all the delegates (being in number eight) to the Republican legislative convention for the Thirty-Fourth legislative district, to be held in Rugby, Pierce county, North Dakota, on the 9th day of August, 1902. Said delegates selected Aug. 9th, 1902. The following named are duly selected delegates for the said convention, and are authorized to act as such delegates in every capacity appertaining to said delegates at the said legislative convention." We find, then, that, on the day

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the legislative convention assembled, Charles D. Donnelly was accredited by credentials as a delegate from McHenry county, and as one of the eight delegates to which that county was entitled, and that George E. Bowers had no credentials, and it is not claimed that he ever had any credentials, from the officers of the McHenry county convention.

We turn now to the legislative convention at Rugby. It is conceded that the legislative committee convened in the courtroom, where the convention was called to be held, immediately before the assembling of the convention,—all members being present in person or by proxy,—for the purpose of examining credentials and determining what persons were entitled to participate in the preliminary organization of the convention; and it is further conceded that said committee was clothed with such power, and that it was their duty to make such determination. The meeting of the committee was held upon the platform in the courtroom in the presence of the delegates and a considerable number of spectators. The credentials of the Pierce county delegates were presented and adopted. The committee also accepted the credentials of the McHenry county delegation, hereinbefore set out, which contained the name of Donnelly, and did not contain the name of Bowers. Stevens presented his proxy from Bowers to said committee, and demanded that he be given a seat in the temporary organization. The controversy as to whether Donnelly or Stevens was entitled to a seat was discussed at considerable length before the committtee, in the hearing of the delegates and spectators. Stevens addressed the committee for eight or ten minutes, stating the circumstances under which he procured the proxy, and his version of the facts as to Bowers' selection by the McHenry county convention. At the request of a member of the committee, Mr. Fox preented his views, claiming that the McHenry county convention had authorized him to select the delegates, and that he had selected Donnelly, and had authority to do so by virtue of the resolution of the McHenry county convention. The action taken by the legislative committee upon this contest, which was after a full hearing in the presence of the delegates, is correctly set forth in the minutes of the secretary, H. C. Hurd, of Pierce county, and an adherent of the Pierce county faction, as follows (omitting the names of the committeemen and delegates): "Rugby, N. D., August 9th, 1902. Legislative committee for the Thirty-Fourth legislative district met for the purpose of acting on the credentials of persons entitled to participate in the legislative convention to be held at Rugby, North Dakota. * * * Credentials of McHenry county delegation were presented * * * and accepted. Credentials from Pierce county * * * were presented and adopted. George H. Stevens presented a proxy of George E. Bowers, whose name not appearing on credentials from McHenry county, the committee decided to leave matter to delegation from McHenry county." It is clear, we think, that the effect of the committee's action was to

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accpet Donnelly's credentials, and deny Stevens' alleged right to participate in the temporary organization, and, further, that any uncertainity which may have existed as to his status was removed by the unanimous action of the McHenry county delegates in repudiating his claim, and by their persistent denial of his right to a seat at all stages of the proceedings. That this was their attitude appears from the affidavit of the relator. Upon the adjournment of the legislative committee, the chairman thereof, G. H. Strong, requested the delegates to come forward and take their places in front of the platform, which request was complied with; and he then called the convention to order, and stated that the nomination of a temporary chairman was in order. Charles D. Donnelly was placed in nomination by one of the McHenry county delegates. James Moffet, of Pierce county, and a member of the legislative committee, but not a delegate, placed G. H. Strong in nomination. His attention being called to the fact that he was not a delegate, he withdrew the nomination. Donnelly was then elected temporary chairman by unanimous vote, and, upon taking the chair, brifly addresesd the convention. H. W. Ellingson, a Pierce county delegate, was then unanimously elected temporary secretary. The original minutes of the legislative committee, kept by H. C. Hurd, which are contained in the record, recite the perfecting of the temporary organization as follows: "Convention called to order by Chairman Strong, and C. D. Donnelly was chairman, and H. W. Ellingson was elected secretary." Ellingson took his position upon the platform, and entered upon the performance of his duties as secretary. Upon motion and by unanimous vote, the temporary organization was made permanent. This was followed by a further motion that the chair appoint a committee on order of business, which was carried unanimously. Then followed a motion that the chair appoint a committee on resolutions, which was also carried unanimously. The chairman announced the membership of the committees, and upon motion, unanimously carried, the convention took a recess. The report of the foregoing proceedings, so far as shown by the minutes kept by the secretary, Ellingson, which are contained in the record presented to this court, are as follows: "Moved and seconded that the temporary organization be made permanent. Chair appointed on order of business, G. Davidson, ——— Jevnager. Chair appointed on committee on resolutions O. T. Tofsrud, A. M. Christianson, A. M. Rauthgarn. Moved and seconded that we have a recess."

Thus far the proceedings of the convention were conducted by the 15 delegates reported by the legislative committee as entitled to participate in the temporary organization, to-wit, seven delegates from Pierce county, and the eight accredited delegates from McHenry county; and it appears that the proceedings of the convention were in all respects unanimous, and that there was no protest against or dissenting vote upon any of the several motions upon which the convention is shown to have acted. There is a conflict in

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the affidavits as to whether the report of the legislative committee was read to the delegates when the convention was called to order; also as to the extent to which the Pierce county delegates actively participated in the action taken by the convention. A large number of the affidavits filed by the interveners state that the roll of delegates was read by the chairman of the legislative committee, and that the Pierce county delegates voted on the several motions above referred to. The Pierce county delegates and the adherents of that faction state, however, that the roll of delegates was not read, and that they refrained entirely from voting. They further state that Ellingson, who was one of their number, did not voluntarily act as secretary, but that he was coerced into so doing; one affidavit stating that he was carried to the secretary's chair upon the platform. The affidavits of the Fox faction deny that any force or undue influence was used, and state that Ellingson assumed the performance of his duties of secretary voluntarily and pursuant to his election. It is not necessary to a decision of this case, for reasons which will hereafter appear, to determine whether the roll of delegates was or was not read, or whether the Pierce county delegates voted or refrained from voting, as they claimed. The contention, however, that Ellingson's acts as secretary should be deemed to have been done under duress, and did not, therefore, amount to a participation in the convention, cannot be sustained, upon the record before us, in which it appears that he officiated as secretary until recess was taken, and recorded the proceedings of the convention; further, that he assumed his position after recess, and retained the same until the delegates from his county retired from the convention. Shortly after the convention reassembled, after recess, Stevens inquired of Chairman Donnelly as to his status in the convention. His reason for doing so, as stated by him, as well as by the Pierce county delegates in their affidavits, was that it was their intention, in the event that the seven other delegates from McHenry county were willing to recognize him as a delegate, "he and the other seven delegates from Pierce county would ratify the selection of Donnelly as chairman, and of Ellingson as secretary." Upon the refusal of the chairman, to recognize Stevens as a delegates, George H. Davidson, a Pierce county delegate, called another convention in the same room. At the request of said Davidson, Ellingson surrendered his position as secretary, and joined the Pierce county delegates. At this juncture all of the delegates from Pierce county—seven in number—withdrew. Six of them united with the relator, Gronvold, who appears to have obtained the proxy of one Elling Enger, a regularly accrédited delegate of Pierce county, which proxy, however, was not presented to or reported by the legislative committee, and with George H. Stevens, whose right to sit had been rejected by the legislative committee, the McHenry county delegates, and by the convention itself, and organized the convention which nomiated the relator for state senator, and for representatives the persons hereinbefore named. The con-

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vention presided over by Donnelly, which, after the withdrawal of the Pierce county delegates, was made up of the eight McHenry county delegates, whose right to sit had been recognized by the legislative committee and by the convention, elected a secretary in the place of Ellingson, and nominated R. A. Fox for state senator, and as representatives the persons before named. Prior to the adjournment of the Fox convention a resolution was formally adopted, and entered in the minutes, declaring that Stevens was not entitled to a seat in the convention.

Upon these facts we reach the conclusion, without hesitation, that the question as to which convention was the regular one—and that is the only question in this case—must be resolved against the relator, and in favor of the Fox convention. It will be noted that the delegates from both Pierce and McHenry counties assembled in the court room, and that they were called to order for the purpose of organization by the proper officer; further, that all of the votes taken upon the selection of temporary and permanent officers of the convention and for the appointment of committees, as well as all subsequent votes, including the nomination of the Fox ticket, were unanimous. The affidavits singularly agree that there were no negative votes on any proposition before the convention. The relator claims that all of the proceedings of this organization, including the election of its chairman and secretary, were effected by a minority of the delegates present and entitled to participate in the convention, and should therefore count for naught. His contention is that the seven Pierce county delegates and Stevens constituted a majority of the convention, and that they did not vote or participate in the convention. From this assumption the conclusion is reached that all of the proceedings of the Fox convention were based upon the action of but seven delegates. These assumptions are clearly erroneous. The claim that the Pierce county delegates did not participate in the proceedings cannot be sustained. True, they may not have voted, and for the purposes of this proceeding we will assume they did not; but concededly they were present, and the most they claim is that they refrained from voting for officers and upon several motions which were made. This was not enough. They constituted themselves members of the convention by their presence, and by their silence they assented to all that was done. The rule applicable to assemblages such as this is that, "after an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting, because their presence suffices to constitute the elective body, and if they neglect to vote it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote; and such election is valid, though the majority of those whose presence is necessary to the assembly protest against any election at that time, or even the election of the individual who has

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the majority of votes." This statement of the rule was approved in *State* v. *Green,* 37 Ohio St. 227, and *Launtz* v. *People,* 113 Ill. 137, 55 Am. Rep. 405. Lord Mansfield, in *Oldknow* v. *Wainwright,* 2 Burrow, 1017, states that, "whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do." That was a case relating to the election of a town clerk, at which 21 assembled, 9 of the 21 voted for the nominee, 12 did not vote at all, and 11 protested against the election. See, also, *U. S.* v. *Ballin,* 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321; *Attorney General* v. *Shepard,* 62 N. H. 383, 13 Am. St. Rep. 576. In *Rushville Gas Co.* v. *City of Rushville,* 121 Ind. 206, 23 N. E. Rep. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388, the court quoted the above rule, and added that: "If members present desire to defeat a measure, they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence, rather than opposition. Their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members." See cases cited in opinion.

The contention that Stevens was entitled to participate in the preliminary organization and in the convention is equally untenable. The most that can be said is that he was a contestant for Donnelly's seat. The decision of the legislative committee was adverse to him, and it is conceded that this committee had power to pass on contests for the purpose of the preliminary organization. His demand for recognition was also rejected by the unanimous action of the convention, in which, as we have seen, all of the Pierce county delegates participated. On the question as to whether Stevens or Donnelly had the better right we may not inquire, for the reason that the convention was the exclusive judge of the qualifications of its members, and by its action it conclusively determined the contest against Stevens and in favor of Donnelly. *State* v. *Lavik,* 9 N. D. 461, 83 N. W. Rep. 914.

The next inquiry is whether the withdrawal of the seven Pierce county delegates from the convention deprived it of the power of proceeding with the business for which it was convened. A negative answer must be given to this question. The convention was not a select body, requiring the presence of a majority of all the persons entitled to participate in order to constitute a quorum for the transaction of business. The common-law rule as to assemblages of this character is that, where the meeting is regularly called, those who actually assemble constitute a quorum, and a majority of those voting is competent to transact business. Those who do not attend are presumed to assent to the action of the majority of those who do attend and vote. *Field* v. *Field,* 9 Wend. 395; *Craig* v. *Presbyterian Church,* 88 Pa. 42, 32 Am. Rep. 417; *Ex parte Willcocks,* 7 Cow. 401, 17 Am. Dec. 525; *Everett* v. *Smith,* 22 Minn. 53; *Smith* v. *Proctor,* (N. Y.) 29 N. E. Rep. 312, 14 L. R. A. 403; *Lawrence* v. *Ingersoll,* (Tenn.) 6 L. R. A. 308, and note (s. c. 12

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S. W. Rep. 422, 17 Am. St. Rep. 870); *Cass County* v. *Johnston*, 95 U. S. 360, 24 L. Ed. 416. It follows, therefore, that, by withdrawing, the delegates merely waived their right to participate in the convention, and that their action in so doing did not affect its identity, or deprive those who were present of the right to proceed with the business of the convention. This we understand to be true in all cases, whether the withdrawing members constitute a majority or a minority. In this case the fact is established, however, that a majority of lawful delegates was present at all times in the Fox convention, and participated in its action. The convention which nominated the relator consisted of six regular delegates,—the relator, who held a proxy, and Stevens, whose right to participate had been rejected by the regular convention. These facts bring the case fairly under the decision of this court in *State* v. *Lavik*, supra, wherein we held that a minority of the delegates to a political convention cannot withdraw therefrom, and join themselves with those whose credentials have been rejected, and successfully claim that they constitute the legal party convention.

It follows from what we have said that the alternative writ should be quashed, and a peremptory writ issued, commanding the secretary of state to certify the Fox ticket as the Republican nominees, and it is so ordered. All concur.

(91 N. W. Rep. 944.)

STATE *ex rel* C. W. BUTTZ *vs.* A. A. LIUDAHL.

Political Convention—Decides Political Questions.

After a contest on the merits after notice, and a full and fair hearing before the state central committee, a decision of such committee that certain delegates from a county convention be seated in the convention, and that the opposing delegates be not seated, followed by the adoption by the state convention of the decision and report of such committee, the courts will not interfere with such action of the convention, but such action of the convention will be deemed conclusive, even as against those persons nominated in a rival county convention for county officers.

Function of State Convention.

Persons affiliating with a political party thereby recognize party organization, and persons accepting nominations from political conventions, in case of nominations by rival conventions, do so at the peril of action by the state convention declaring the convention nominating them irregular as a party organization.

Judicial Notice of Powers of State Convention.

The powers of state conventions as the highest party organization are so well known that courts will take judicial recognition thereof.

County Conventions.

A county convention of a political party cannot be the regular party organization for one purpose, and irregular for another purpose within its scope to act upon.

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No Right of Appeal from Convention to Court.

The provisions of the Australian ballot law of this state are *held* not to give a nominee of a county convention not recognized as regular by the state convention, on a contest before it involving that question, the right to appeal to the courts for relief, although such county officer was not a party to such contest before the state convention.

Application by the state, on the relation of C. W. Buttz, for writ of mandamus to A. A. Liudahl, county auditor of Benson county, N. D. Writ denied.

O. D. Comstock, Alfred Dresser, G. T. Christianson, and *C. W. Buttz (Morrill & Engerud,* of counsel), for plaintiff.

W. H. Thomas, C. L. Lindstrom, and *Cochrane & Corliss,* for defendant.

MORGAN, J. An alternative writ of mandamus was issued in this court, on application of the relator, commanding the defendant, the auditor of Benson county, to cause the relator's name to be printed on the official ballot of the Republican party for said county as the nominee of said party for the office of state's attorney of said county, at a convention of said party duly and regularly called and held, and also to cause to be printed on said official ballot the other nominees of said convention for the county offices of said county, or to show cause why the commands of said writ should not be obeyed. The affidavit on which such alternative writ of mandamus was based and issued states the following facts, which will sufficiently show the grounds on which it is claimed that a peremptory writ should issue, viz.: That a Republican convention was duly called by the regular central committee of said party in said county for the purpose, among others, of nominating the candidates of the Republican party of said county for all the county offices of said county to be voted for at the next general election in said county; that said county convention was duly held at the time and place stated in said call, and pursuant to said call, and was duly organized at such place by the election of a chairman and secretary; that said convention duly nominated candidates for all county offices, and among them the relator for the office of state's attorney of said county; that the chairman and secretary of said convention duly executed a certificate of the nomination of all such persons for such offices, as required by law, and filed the same in the office of said county auditor on August 2, 1902; that on the 19th day of July, 1902, there was filed in the office of the auditor of said county a certificate, in regular form, of the nomination of other persons claiming to have been duly nominated for county offices of said county by said convention; and as to such other certificate of nominations the relator states that it is false and spurious, and is not what it purports on its face to be; and in reference to such other nominees the affidavit states such other nominees were not nominated by any regular

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convention of the Republicans of said county, but were nominated by 35 delegates of the regular convention of said county at which relator was nominated, which said 35 delegates withdrew from said regular convention after they had participated in the organization of said convention, and withdrew on account of a decision of said convention upon the claims of 7 delegates to seats in said convention, which said decision was adverse to such 7 delegates; that said 35 delegates withdrew, and, after joining with such 7 rejected delegates, organized a convention, and nominated the persons named in the certificate filed on July 19th; that said pretended convention was not a convention of a majority of the delegates entitled to seats in the regular convention of said county, and was not in any respect the regular convention of the Republicans of said county. The alternative writ of mandamus recites the same facts stated in the affidavit, which have been substantially recited herein. The answer of the defendant alleges that the convention at which the relator's ticket was nominated was not composed of a majority of the delegates entitled to seats in the regular Republican convention of said county, but was composed of a minority only of said delegates; that the chairman of the county central committee called the delegates to order; that one Hall and one Palmer were, respectively, nominated as temporary chairman of said convention; that said chairman of said county central committee fraudulently and arbitrarily declared said Hall elected temporary chairman after a viva voce vote had been taken, when in fact he had not received a majority of the votes of said delegates, but said Palmer had received a majority of such votes; that there was a contest from the Ft. Totten precinct, and that the county central committee duly decided that the contesting delegation was entitled to seats in said convention; that a motion was made and carried before said convention, after the temporary organization, that said contesting delegation be allowed seats in said convention; that thereafter a motion was made by a person not a delegate that the other set of delegates be seated in said convention, and pending the discussion of this motion another motion was made, and declared carried, that both delegations from Ft. Totten precinct be denied seats in such convention; that said Hall corruptly, arbitrarily, and fraudulently declared such motion carried, when in fact it was not carried, but was voted for by a minority only of the delegates present at said convention, entitled to seats therein; that said Hall refused to allow a vote by ballot on said question, and refused to allow an appeal from his decision, although one was called for; that there was much confusion in said assemblage, and spectators were permitted to vote; and that thereupon 37 delegates, in conjunction with the 7 delegates, organized a convention, in order to avoid personal encounter and possible bloodshed, and, after electing one Voight chairman and one Wardrope secretary, nominated a county ticket, represented by the certificate filed in the county auditor's office on July 19th. The answer further alleges that said county con-

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vention, in accordance with the usage of the Republican party, was called for the further purpose of electing delegates to the Republican state convention to be held in Fargo on July 23, 1902, in addition to nominating candidates for county offices; that the so-called Hall convention and the regular convention presided over by Voight each nominated 22 delegates to attend said state convention; that each set of these delegates presented their credentials to the state central committee, and after a hearing on notice, as to which of these delegations should be seated in said state convention, said state central committee decided that the delegation from the Voight convention should be seated; that the said state convention appointed a committee on credentials, and said committee on credentials, after due consideration of all the facts in relation to said contest, decided in favor of seating said Voight delegation; and that thereafter the state convention duly decided in favor of seating said Voight delegation, and against seating the Hall delegation. The issues raised by the answer to the writ are supported by each of the parties to the proceeding by voluinous and numerous affidavits, which are conflicting upon what actually transpired during the preliminary organization of the convention, and which conflict upon the question as to which delegation from the Ft. Totten precinct was entitled to be seated, which conflict upon the question whether the Voight delegates were justified in withdrawing from the Hall convention and organizing another convention in another place, and which further conflict as to whether the Hall convention or the Voight convention had the majority of the rightfully elected delegates to said convention.

The question to be decided by us is which of the two tickets certified to and filed with the county auditor by the officers of the Hall and Voight conventions, respectively, shall be printed upon the official ballot of Benson county. Both certificates are regular in form. The auditor is not empowered by any law to determine which of the two conventions was the regular one, in such cases as this, and is not authorized to print the nominees of both conventions on the same ballot. In this case there was but one of these conventions that could rightfully claim to represent the Republican party, and there was but one regular organization of that party in Benson county on July 19th. Both of these conventions cannot successfully maintain their claim to regularity. Both claim under the same party call for a convention, issued by the regular county central committee. Hence the provisions of chapter 48 of the Laws of 1901, authorizing the county auditor to determine, from the best available sources of information, which organization filing certificates of nomination for different candidates for the same offices in the same party has been longest in existence, does not apply, and neither party so contends. Hence it becomes a question for a decision by this court, settling in this case which of these two rival conventions resulting from a split in the regularly called convention is entitled to be called

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the regular convention, and, in consequence of such regularity, entitled to have its nominees for county offices printed on the official ballot. In several cases this court has decided similar issues involving the claim to regularity between rival conventions emanating from one convention and one call. *State* v. *Lavik,* 9 N. D. 461, 83 N. W. Rep. 914; *State* v. *Falley,* 9 N. D. 450, 83 N. W. Rep. 860; *State* v. *Porter,* 11 N. D. 309, 91 N. W. Rep. 944. Both parties in this case have submitted the controversy for decision on the merits, without objections going to the jurisdiction of the court to entertain the proceedings.

The answer alleges that the state convention of the Republican party duly assembled at Fargo, under a regular call, recognized the delegates elected at the Voight convention as entitled to seats in said state convention, and duly seated them therein, after due consideration of the facts, and after hearing all the parties, on notice. After due consideration of this allegation of the answer, we are of the opinion that it states a defense, and, the same having been proven without contradiction, is decisive of the question as to which of these two tickets of county officers is entitled to be placed on the official ballot. In the affidavits presented to us by the defendant, this allegation of the answer is supported by undisputed testimony, and from one of such affidavits we quote the following part, viz.: "And that before the meeting of said state convention the question which of the two said delegations from Benson county should be seated in said convention was brought before the state central committee on notice, and that both sides were fully heard on such question, and affidavits and others proofs produced before said committee by each of said delegations, and that said central committee, after fully and fairly hearing such contest, and duly considering the same, decided in favor of the seating in said state convention the delegation nominated by the convention composed of said forty-four delegates, and also decided against the right of the twenty-two delegates elected by the pretended convention presided over by said A. A. Hall to seats in said convention, and that said report of said central comittee was subsequently duly adopted by said state convention, and said twenty-two delegates elected by the convention composed of said forty-four delegates were by said state convention seated as delegates therein, and participated in all the proceedings of said convention as such delegates, and that said state convention refused to seat said other twenty-two delegates in said convention, or to recognize them as delegates thereto." Thus it is alleged and proven that a contest was initiated before the state central committee for the purpose of determining which of these delegations was entitled to seats in the state convention. Notice was given of the contest, both delegations appeared, evidence was heard, the differences between the opposing delegations submitted for a decision, and the committee rendered a decision that the Voight delegates be admitted to seats. The state convention affirmed the decision of the committee, and the Voight

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delegates were seated. The state convention therefore has passed directly upon the question which we would be compelled to decide were we to determine the issues from the evidence, to-wit, which convention was the regular one, and entitled to represent the Republican party in Benson county? If we were to enter upon a consideration of the evidence, to determine which of those nominees should be held entitled to be placed on the official ballot, the merits or demerits of either faction, whether parliamentary rules had been observed, and whether mistakes had been made as to such rules, would not be considered by us at all, save as decisive of or tending to decide the pivotal question in all such cases, viz., which convention was the regular convention called to be held on that day by the persons hitherto duly authorized to do so? By deciding that the Voight delegates were entitled to be seated in the state convention, the convention nominating such delegates was thereby recognized as the regular convention for Benson county. True, the regularity of that convention was only recognized by the seating of the delegates sent by it to the state convention. That, however, was a recognition of it as the regular convention for that purpose, and, if regular for that purpose, it must be the regular convention for all purposes for which convened. A convention cannot be the regular one for one purpose, and not the regular one for another purpose within its scope or authority to act.

It is claimed, however, that the state convention had no authority to pass upon the regularity of the Benson county convention, so far as its action in nominating county officers is concerned; that it derived its authority to recognize the Voight convention by seating its delegates by virtue of the fact that all conventions are clothed with power to decide upon their own membership; that the conventions of each county are finally to determine, when regularly convened by proper authority, who the candidates for offices shall be, subject to review by the courts; and that a person regularly nominated by a convention cannot be lawfully deprived of his right to go on the official ballot of the county by the state convention. This contention, it is claimed, is sustained by the provisions of the Australian ballot law of this state. This law provides for holding caucuses, and authorizes committees to divide counties into precincts, and to fix precinct representation to county conventions. It specifies the manner of organizing and conducting caucuses, and that caucus elections shall be canvassed and certified by the chairman and clerk. It also defines a convention, and prescribes the manner of calling conventions, and how nominations are made, certified, and placed upon the official ballot. It may be admitted that this law provides that a resident elector receiving a regular nomination for a public office by a convention representing a party, as defined in the statute, is thereupon entitled to have his name printed on the official ballot of the party nominating him, in case all the statutory requirements have been complied with. But when the highest governing organi-

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zation of a party in the state decides, on a contest, after hearing evidence, and with the contending factions present and before it, and in a matter properly before it and within its authority to decide, that a subordinate convention at which a person was nominated was not the regular convention of the party in a county, can a person nominated at such county convention be deemed to have received such a nomination as entitles him, in case of opposition, to have his name placed on the official ballot of his party? In this case there is no proof of party usage on this question, and no statute upon the subject of the force of a recognition by the highest organization of a party of the regularity of one of two conventions of an inferior organization, caused by one of them forming a separate convention. However, the organization of political parties has existed so long that their powers and authority are matters of common notoriety; and it is fact within the knowledge of all that political parties in this state are composed of precinct, county, and district organizations, all inferior in powers and authority to, and subject to the control and authority, in matters of their government and actions, of, the state convention, composed of representatives from every county, and therefore the highest authority of the party in the state.

We do not deem it a question dependent for its solution on the fact whether party usage has been proven as sustaining or authorizing the action of the state convention, but a question of power vested in the highest political body by the very nature of the organization of political parties, or any other voluntary association composed of inferior and supreme bodies directly connected with each other. The highest body or convention dictates as to policy and procedure of the lower organization, and decides differences existing therein, and thus is party organization effected and maintained. By affiliating with a party, an elector recognizes party organization, and a nominee accepting a nomination contested by a nominee of a rival convention does so with knowledge that the regularity of his nomination is subject to decision by the highest authority of his party, when properly brought before it to determine the regularity of the convention at which he was nominated. *In re Redmond,* (Sup.) 25 N. Y. Supp. 384. Disputes of this kind, involving the regularity of rival conventions and involving the further question as to which set of county officers nominated by these rival conventions are entitled to recognition, are political questions, and should be settled by political bodies; and, in the absence of statutes conferring in unmistakable language upon courts the right and duty to decide such controversies, they should not undertake to do so, when the highest organization of the party has passed upon the question, but suffer the same to remain in the domain of politics. Courts have occasionally been called upon to pass upon question similar to the case at bar, and, when not based upon statute law, the rule that such decisions are most properly to be determined as to political questions by political conventions, or their committees duly authorized, seems to us

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founded on the best reasons. In *Re Redmond*, (Sup.) 25 N. Y. Supp. 381, which was based upon a statute, the court said: "The wisdom of the legislature in imposing upon courts and judges the duty of determining the regularity of political noinations is something which may well be questioned, for it is almost impossible to reach a conclusion in such a case without subjecting the tribunal which renders it to a charge of partisanship. * * * But nevertheless the party cannot exist without its machinery, and, if that machinery is used oppressively and for improper purposes, the right and the power to remedy the evil undoubtedly reside in the party itself; and so it will be found that, in the fiftieth section of the act in question, provision is made for the conduct of political parties by means of conventions and primaries, and by such rules and regulations as those bodies may adopt. But independent of such act, it is a fact so well known and of such long-continued existence as to entitle the same to judicial recognition that political parties have their territorial divisions, and that while each division is, within certain limitations, a law unto itself, so far as the particular territory it assumes to represent is concerned, yet by party usage each of said divisions owes and yields allegiance to some higher power." The syllabus in that case is as follows: "A determination by the state convention of a party, on a contest between two delegations as to the regularity of the conventions by which they were nominated, will be treated by the courts as conclusive." This decision was made under a statute authorizing a nominee dissatisfied with the decision of the county clerk in refusing to file a certificate of nomination to appeal to the courts, and, notwithstanding such statute, the court held the action of the state convention, in recognizing one of the conventions as regular, conclusive, so far as the court was concerned. *In Re Pollard*, (Sup.) 25 N. Y. Supp. 387, the court said: "The proposition which presents itself is simply this: Shall the precedent which has been established by courts and judges, or that which has been established by political conventions, be followed? * * * I still think, as already stated, that the title to regularity of the Patterson faction was pretty clearly established upon the original hearing, and that it would, in view of the provision of the statute which authorizes this proceeding, have been no more than courteous for the party conventions to have adopted the decision of the general term, which was deliberately made after a careful and impartial hearing, but there is no way in which they can be compelled to do so; and consequently it seems to me that the only rule for courts and judges to adopt in this and all other similar contests is that they will interefere only in cases where there has been no adjudication of the question of regularity by some division of the party which is conceded to be superior in point of authority to the one in which the contention arose, provided, of course, that the question of good faith in the making of such adjudications is not involved. The adoption of a different rule will inevitably tend to bring party organizations and the courts into un-

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seemly conflicts over questions which are peculiarly within the cognizance of the former tribunals,—a result which certainly ought, if possible, to be avoided." In *Re Fairchild,* 151 N. Y. 359, 45 N. E. Rep. 943, the court of appeals passed upon a question simliar to the one before us. When that decision was rendered, the law of 1896, pertaining to elections, was in force. That law provided that questions pertaining to the validity or legality of certificates of nomination should be determined in the first instance by the officer with whom such certificate of nomination was filed, and that the supreme court should have summary jurisdiction to review the determination and acts of such officer, "and to make such order in the premises as justice may require." In that case the only question involved was, which of two conventions was regular. It was conceded that, if a convention was regular, it had the same authority to elect congressional delegates as it had to elect state or judicial delegates. In that case it is said: "It is much more proper that questions which relate to the regularity of convention, to the nomination of candidates, and the constitution of committees, should be determined by the regularly constituted party authorities, than to have every question relating to a caucus, convention, or nomination determnied by the courts, and thus, in effect, compel them to make party nominations and regulate the details of party procedure, instead of having them controlled by party authorities. We think that in cases where questions of procedure in conventions or the regularity of committees are involved, which are not regulated by law, but by party usage and customs, the officer called upon to determine such questions should follow the decision of the regularly constituted authorities of the party, and courts, in reviewing the determination of such officer, should in no way interfere with such determination." In *Cain* v. *Page,* (Ky.) 42 S. W. Rep. 336, the court decided that the action of the state convention in deciding what committee was the governing body in a county organization was conclusive upon the courts, even after a contest between two rival candidates before such county convention. The court said: "The voice of that convention was the very voice of the Democratic party. The word of the convention is the law of the party, and courts cannot look beyond this word or this law, because there is no other." This decision was expressly followed in *Moody* v. *Trimble,* (Ky.) 58 S. W. Rep. 504, 50 L. R. A. 810, the court saying: "The averments of the answer, taken in connection with those of the petition, and which are emphasized by the recitation of the Lexington resolution, show that there was a dispute, in good faith, as to who was the true nominee of the Paris convention. A settlement of this dispute might possibly be had in the courts, when the correctness of the various ruling of the presiding officers of the meeting would have to be inquired into, as well, possibly, as the regularity of the credentials of the various delegates. But while we do not now decide that this cannot be done, it is certain that such questions are political,

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rather than judicial, in their character; and therefore the court will entertain jurisdiction to settle them, if at all, only in the event the governing authorities of the political parties have failed to do so. The settlement of such questions, in the nature of things, should be left to party authority; and therefore we will not scan too closely party rules which undertake, however imperfectly, to confer authority on its various committees to manage party affairs to the best interests of the organization, nor deny such authority, even if it be conferred in terms somewhat general. We construe the party rules in force when the Paris convention met as sufficiently explicit to authorize the state central committee to settle disputes of the nature involved in this case, and especially do we think that authority existed in the state convention to provide a means, if none existed, of settling such disputes." The case of *Twombley* v. *Smith,* (Colo. Sup.) 55 Pac. Rep. 254, is cited as authority in favor of the plaintiff. That decision was based on the fact that the state convention had no contest before it as to the seating of the delegates seated therein. In that case a vigorous dissenting opinion was filed by Chief Justice Campbell, and his views, as expressed in his dissent, seem to us to be supported by the better reasons. It is earnestly urged that the cases cited in defendant's brief and cited herein are not applicable to the facts of this case, as they do not pass upon the rights of nominees, but simply decide questions of regularity of organizations or committees. This is true as to some of the cases. Our decision is based upon the ground that the Voight convention was alone the regular convention of Benson county, because sustained by the state convention. Such being the case, the Hall convention did not represent the party organization in that county, and could not regularly nominate officers. In all cases the decisive question is as to which convention is the regular convention of the party, and the fact that the conventions have made nominations for offices cannot, it seems to us, be controlling, under our construction of the statute prescribing how nominations are made.

The application for a peremptory writ of mandamus is therefore denied. All concur.

(91 N. W. Rep. 950.)

STATE *ex rel* P. E. BYRNE *vs.* PETER WILCOX, *et al.*

Elections—Creation of Precincts—Irregularities.

This is an application of P. E. Byrne, an elector of the city of Bismarck, and a candidate for the office of county auditor of the county of Burleigh, for leave to file an information in this court as a foundation for invoking the original jurisdiction of this court by issuing the writ of injunction. The attorney general of the state has indorsed upon the information his disapproval of the application. The defendant Moorhouse is county auditor of the county of Burleigh, and the other defendants were named as in-

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spectors of elections by a resolution adopted by the board of county commissioners of said county on the 2d day of September, 1902, to act as inspectors in certain election precincts within the city of Bismarck, which precincts were established, or attempted to be, by said commissioners, by a resolution adopted by them on said date. The writ is sought to enjoin the defendants from taking any action in or about the holding of an election in the election precincts so created. It is urged in behalf of the petitioner that the precincts so attempted to be created by the commissioners are illegal, and have no warrant in law, for the reasons: First, that said precincts do not conform to the lines of the several wards of the city of Bismarck; and, second, that the statute itself creates the voting precincts within the city, and makes each ward of the city a voting precinct; and, finally, that in no event are the commissioners authorized to change or alter the boundaries of any voting precinct within the city, inasmuch as authority to do this is expressly conferred by statute upon the city council. The petition omits to charge that the commissioners acted fraudulently in so attempting to create the election precincts, or that the defendants, or any of them, have or will act fraudulently in the matter of holding the contemplated election in said precincts; nor does the petition allege in terms that any candidate will be prejudiced, or that any elector will be prevented from casting a free ballot, by the defendants, if the contemplated election is held. For the purposes of this proceeding, and for reasons set out in the opinion, it is *held*, that the contemplated election, if permitted, will, under the facts stated in the petition, be merely irregular, and will not be absolutely illegal and void.

Supreme Court Without Jurisdiction upon Facts Disclosed.

Held, further, that the facts presented by this petition do not suffice to invoke the original jurisdiction of this court in defense of either the prerogatives of the state, its franchises, or the liberties of its people.

Leave to File Information Necessary.

Held, further, where this court, upon any of the grounds enumerated, will take original jurisdiction, leave to file an inormation should be applied for by the attorney general of the state on behalf of the state; and that the cases are few and quite exceptional in which this court will, in behalf of the state, assume original jurisdiction at the instance of a private citizen.

Petition Quashed.

Held, further, that this case is not a case in which the original jurisdiction of this court can be put in motion by a private citizen. The motion to quash the petition is granted.

Application by the state on relation of P. E. Byrne for an injunction against Peter Wilcox and others. Writ denied.

Newton & Smith, for the application.

Cochrane & Corliss, Boucher, Philbrick & Cochrane, and *E. S. Allen* for defendants.

WALLIN, C. J. In this proceeding, on the petition of P. E. Byrne, a chambers order was issued by one of the judges of this court, directing the defendants to show cause before this court at Bismarck.

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on the 7th day of October, 1902, why the relief sought by the petitioner should not be granted. The order having been served, the matter came on to be heard before the court assembled at Bismarck. At the hearing Messrs. Newton & Smith appeared for the petitioner in support of the petition and Messrs. Cochrane & Corliss appeared in behalf of the defendants. At the hearing before the court, counsel for defendants, appearing specially, filed a motion to quash the proceeding. The grounds of the motion which we deem to be most important are stated as follows: "(2) The consent of the attorney general has been refused, and the case is one where the court should decline to take jurisdiction unless the attorney general initiates the proceedings. (3) The case is not one in which the supreme court can take original jurisdiction." "(6) No sufficient reason is shown why the application is not made to the district court."

In passing upon this motion it becomes necessary to make particular reference to the petition, which contains a statement of the facts upon which the petitioner relies as a foundation for relief, and also a statement of the particular relief which is sought. Only the substance of the petition will be given, except where quotations are deemed necessary to a proper understanding of the case. It states in effect, that the relator is a citizen of Burleigh county, in this state, and is an elector of the Fourth ward of the city of Bismarck, which city is situated within Burleigh county, and is, and since September 20, 1900, has been, incorporated as a city under the general laws of the state governing cities, embraced in chapter 28 of the Political Code; and that petitioner is the nominee of the Independent and Democratic party of said Burleigh county for the office of county auditor of said county, to be voted for at the general election to be held on the first Tuesday of November, 1902. The petition further alleges, after giving a description of the territory embraced within the city, that the city contains four wards, and that it has been divided into four wards for a period of more than 10 years, and each of said wards is described in the petition by its metes and bounds. The petition gives the total of the votes cast in each of said wards at the city election held therein in 1901 and in 1902, showing that less than 200 votes were cast in each of said wards at said elections, respectively. It further appears that each of said wards has two regularly elected and qualified aldermen. The petition further states that at all elections hitherto held for state and county purposes within said city the city has been divided into three election precincts by the county commissioners, and each of said precincts is particularly described by metes and bounds with reference to township and ward lines. The particular acts complained of are set forth as follows: "That on or about the 2d day of September, 1902, the board of county commissioners, then convened as such board, among other things by them done, adopted and spread upon its records the following resolution: 'Whereas, it appears that, owing to the increase in the number of votes in certain precincts of the county, and that certain

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changes should be made in precincts heretofore made, and that new ones should be established: Therefore, be it resolved, that precinct No. 1 be established as follows: All that portion of the city of Bismarck lying west of the center line of Fourth street and south of the township line running between township 138 and 139. That precinct No. 2 be established as follows: All that portion of the city of Bismarck lying between the center line of Fourth street and the center line of Seventh street and south of the township line running between township 138 and 139. That precinct No. 31 be established as follows: All that portion of the city of Bismarck lying east of the center line of Seventh street and south of the township line running between township 138 and 139. That precinct No. 30 be established as follows: To consist of township 141, range 79. That precinct No. 32 shall be established as follows: Shall consist of township 141, range 78. That, except with the change of precincts No. 1, 2, and 30, and the establishing of the precincts of the same number as above set forth, and the establishing of precincts No. 31 and 32, there is no change made in the voting precincts hereinbefore established.' That at said time the said board of county commissioners undertook and then and there named and appointed certain persons as inspectors of elections for the said various precincts so undertaken to be established for the city of Bismarck by it, as follows: For said precinct No. 1, Peter Wilcox; for said precinct No. 2, Frank Donnelly; for said precinct No. 31, Richard H. Penwarden; and for said precinct No. 12, or High School precinct, C. A. Burton. That the said persons so attempted to be appointed as inspectors of elections for the said several precincts, as hereinbefore shown, so attempted to be established in said city of Bismarck by said board of county commissioners, intend to act as such inspectors, and in such pretended precincts, so attempted to be established, at the general election next to be held in the state of North Dakota and in said Burleigh county and said city of Bismarck on the first Tuesday of November, 1902." The petition likewise avers, in substance, that, besides two members of congress, there are to be elected at said election the several state officers and the county officers of said county of Burleigh. It is further alleged, in effect, that each of the four wards of the city is a legally established ward, and that, as such, each ward constitutes an election district, and that in said city each ward constitutes an election precinct under the statute, for the reason that none of said wards contain as many as 300 electors. The petition further alleges, in substance, that the county commissioners of Burleigh county are wholly devoid of lawful authority, and were, when the resolution above set out was attempted to be adopted by said board, without lawful authority to establish or to alter any election precincts within said city of Bismarck, and were equally without authority to appoint the persons above named as inspectors of any election precincts within said city; and the said persons named and attempted to be appointed by said resolution of the board were and

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are wholly without lawful authority to act as inspectors in the said election precincts so attempted to be established. Upon this showing of facts by the petition the relator asks, in substance, for the following relief in this court: First. An adjudication by this court declaring said resolution of the board of county commissioners to be "illegal and void." Second. That an injunction be issued enjoining the several persons named in said resolution as election inspectors from acting or attempting to act as such election inspectors within the city in any of the election precincts attempted to be established or created by the terms of said resolution of the commissioners. Third. For an order restraining and enjoining the defendant W. S. Moorhouse, as county auditor of Burleigh county, from recognizing either or any of the election precincts attempted to be established by said resolution of the commissioners, and restraining and enjoining the said Moorhouse from preparing any ballots to be used by the electors of the city of Bismarck with any reference to said election precincts so attempted to be created, enlarged, or diminished by said resolution of the commissioners. The record discloses the additional fact that the petitioner, before presenting his said petition to a member of this court as a basis for an order to show cause, exhibited the petition to the Honorable O. D. Comstock, attorney general of this state, and requested that official to join in the proceeding and co-operate with the petitioner in his application to this court for said injunctional relief. The attorney general expressly refused to comply with the request of the petitioner, and, as manifesting his official attitude with respect to this proceeding, the attorney general caused to be indorsed upon said petition a certain statement, to which he affixed his official signature, which statement is as follows: "Upon due consideration of the matters and facts set forth in the within petition of P. E. Byrne, I hereby disapprove the same, and refuse to join in the motion that it be filed, and the writ therein asked for issued."

We think this statement of the facts will suffice as a basis for a consideration of the preliminary motion to quash the proceeding, and to the merits of this motion we will now give attention. The second ground of the motion is as follows: "The consent of the attorney general has been refused, and the case is one where the court should decline to take jurisdiction unless the attorney general initiates the proceeding." This ground of the motion, by its terms, simply asserts that the case is one in which the court should decline to take jurisdiction. Nevertheless, the motion necessitates a decision of the question presented. To determine this question the court is compelled to consider the case with respect to the procedure in this court in cases of this character. For this purpose we must consider the relief sought, and the query is, what is the essential nature of the relief sought? First, do the facts stated or the relief sought call for any relief which is peculiar to the petitioner as an elector or as a candidate for office? We have examined the facts

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alleged with care, and fail to find in the petition a single averment of fact which would entitle the petitioner to any injunctional relief, which, if granted, would not redound to the benefit of all of the electors and to all the candidates who are referred to at length in the petition. On the other hand, it is entirely clear that this petitioner is seeking by this proceeding to annul certain resolutions of the county commissioners of Burleigh county, claimed to be illegal, and to enjoin certain acts of the defendants which are contemplated, and likewise claimed to be illegal, and which acts, if not prevented, will as is claimed, so operate as to affect the political rights and privileges of the petitioner only in common with those of all other candidates and electors referred to in the petition. It therefore appears that the petitioner has volunteered by this proceeding to become the champion of political rights, privileges, and franchises which are common rights, and are not such as are at all peculiar to the petitioner. Nor do counsel for the petitioner claim otherwise. The fact that the petitioner, as shown, has made application in this proceeding to the law officer of the state, the attorney general, clearly shows that counsel for the petitioner understand that the petitioner is in the attitude of a champion of public rights, and that he does not appear in this court asking relief as a private suitor. If, indeed, it were true that petitioner is seeking the prevention of merely private wrongs, he would then concededly be in the wrong forum. This court, as it has frequently held, is not the proper forum in which to institute original proceedings for the protection of merely private rights, unless this is done in aid of the appellate jurisdiction of this court, or with a view to the exercise of the superintending power of this court over inferior courts. See the late case of *Elevator Co.* v. *White,* (N. D.) 90 N. W. Rep. 12, and cases cited. It therefore becomes pertinent to inquire by what authority a private citizen, and hence a person not expressly required by law to redress or prevent wrongs of a public and general nature, comes into this court, and invokes its original jurisdiction, and demands that this court issue its prerogative writ of injunction to prevent the commission of certain acts which are threatened, and which are alleged to be illegal, and which, if allowed to proceed, will, it is claimed, operate as a wrong done against the elective franchise of all the people of the state.

In this jurisdiction it is well settled that certain writs enumerated in the constitution of the state, and whereby original jurisdiction is intended to be conferred upon the supreme court, are to be employed as strictly prerogative writs, and are to be invoked only in a limited class of cases, viz., where the sovereignty of the state is directly, and not remotely, involved, or where it becomes necessary to invoke the original jurisdiction of this court in defense of the prerogatives or franchises of the state or in defense of the liberties of its people; but in all other litigation jurisdiction must be initiated in the other courts of the state. Hence, as we have held, it is sound

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practice in this class of cases for the attorney general, as the chosen guardian of public interests, to move in this court for the issuance of prerogative writs in behalf of the state; and this for the obvious reason that he is the officer expressly clothed with authority to assert the rights of the state in the courts, and to defend its franchises and prerogatives, and the liberties of its people. This matter was considered in the first case in which this question of practice arose in this state. See *State* v. *Nelson Co.*, 1 N. D. 88, 101, 45 N. W. Rep. 38, 8 L. R. A. 283, 26 Am. St. Rep. 609, in which this language was used: "Except in cases of habeas corpus, leave to file an information must be obtained from the attorney general. When the information makes out a prima facie case, the writ will issue only in cases publici juris, and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people. In such cases the court will judge for itself whether the wrong complained of is one which demands the interposition of this court." In the case cited the subject-matter involved the interests of every taxpayer of Nelson county. Nevertheless the court ruled that the exigency of the case did not demand the issuance of a prerogative writ out of this court, and the writ was refused. As has been seen, in the case at bar, the prerogative writ of injunction has not been applied for by the attorney general, and that officer expressly disapproves of this proceeding. This raises the question whether such writs can lawfully issue out of this court in any case against the advice of the attorney general. To this question we are constrained to give an affirmative answer. This court reserves the right to exercise judicial discretion in all cases where prerogative writs are asked for, and will issue and refuse to issue the writs at its official discretion, and according to the exigencies of cases. Cases may possibly arise when this court, for the protection of grave public interests, may deem it to be its duty to override the express wishes of the attorney general with respect to assuming original jurisdiction. See *State* v. *Cunningham*, 83 Wis. 90, 53 N. W. Rep. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27. But we think it is generally quite safe to assume that the attorney general will co-operate in procuring the issuance of prerogative writs in the exceptional cases where public interests are of such gravity as to demand that this court should take original jurisdiction. In all cases where questions of merely public right are concerned, the advice of the law officer of the state upon the question of instituting judicial proceedings to protect such rights has always carried great weight in the courts, and must continue to do so. The following cases from Minnesota will illustrate this important rule: *In re Barnum*, 8 N. W. Rep. 375, 38 Am. Rep. 304; *State* v. *Tracy*, 51 N. W. Rep. 613. The former of these cases was a quo warranto proceeding to oust the respondent from a public office. The information was filed by one Barnum as relator, and filed without the consent of the attorney general of the state. The supreme court, after ruling that the relator had no private interest

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in the matter which was peculiar to himself, dismissed the proceeding upon the express ground that the right to file the information was vested in the attorney general in such cases, and that a private individual was without authority to initiate the proceedings. The other case was a proceeding in the supreme court, also in the nature of quo warranto, to test the validity of the incorporation of a village. The application was indorsed with the approval of the attorney general, but that officer did not appear in court, and the case was not prosecuted by him or at his instance. The court ruled that the approval of the attorney general in that case was merely formal, and that such approval was not enough, and for this reason the proceeding was dismissed; citing *People* v. *North Chicago Ry. Co.*, 88 Ill. 537. In the leading case of *Attorney General* v. *Chicago, M. & St. P. R. R. Co.*, 35 Wis. 427, Chief Justice Ryan, speaking for the court, uses this language: "The prerogative writs proper can issue only at the suit of the state, or the attorney general in the right of the state, and so it must be with the writ of injunction in its use as a quasi prerogative writ." But, as has been suggested, it is our opinion that cases may arise where this court, in the discharge of its duties, may deem it proper and necessary to disregard either the approval or the disapproval of the attorney general in a case where leave is asked to file an information in this court as a basis of original jurisdiction. But upon the case presented by the petition we are entirely clear that general rule of practice should be upheld, and the advice of the attorney general against issuing the writ should be followed by this court. The official advice is to the effect that the case presented as a matter of law does not directly involve the sovereign rights or franchises of the state, or its privileges, or the liberties of the people. In our judgment, this advice is fully justified by the facts. Just here it becomes convenient to cite an excerpt from the brief of counsel for the petitioner. Counsel say: "Clearly, this court, in the exercise of its original jurisdiction under a prerogative writ, cannot take cognizance of a matter of merely private concern. * * * The matter involved is obviously not of such nature." Counsel proceed to argue that the case is one of public concern, because the subject-matter involved has reference to the important matter of electing not merely the county officers of Burleigh county, but all state officers and members of the lower branch of congress as well; and in this connection counsel say that any elector has the requisite interest to entitle him to assume the championship of the state and of all the public interests involved in the subject-matter. In support of this postulate counsel cite the instructive case of *State* v. *Cunningham*, (Wis.) 51 N. W. Rep. 724, 15 L. R. A. 561. That case is wide of the mark here. That was a case brought by the attorney general of the state upon the relation of one of the counties of the state, represented by its district attorney; and, the case being one strictly publici juris, the court held that no private relator was necessary, and hence the want of interest

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in the private party who, it seems, verified the complaint, was wholy immaterial. The case cited was brought in the supreme court of the state of Wisconsin, and the attorney general asked that the secretary of the state be enjoined from sending out certain notices of election. The relief was granted on the ground that the election in question, if held, would be in pursuance of the provisions of an unconstitutional law, whereby the entire body of voters would be denied political rights expressly safeguarded by certain mandatory provisions of the organic law, which provisions, as was held, had been directly violated in the enactment of the statute under which the election was to be held, if the notices of election were given out. The facts of the case cited are strikingly dissimilar to those of the case at bar. In the case cited the right of the people of the entire state to representation in the legislative assembly in the manner and to the extent provided by the constitution was violated and disregarded by the political gerrymander embraced in the statute which was declared to be unconstitutional by the court. The right of the whole people to be represented in manner and form and to the extent secured by the state constitution was directly at stake in the controversy, and hence the case involved the liberties of the people in the broadest sense of that term. In such a case, if any could ever arise, it would be proper, under the constitution of the state of Wisconsin, and of this state, for the supreme court of the state to accept original jurisdiction; and this was done in the case cited. The transcendent importance of the facts of the Wisconsin case, in view of practical consequences impending to the people, could not well be overstated. In its opinion the court said, in effect, that the matter was of such supreme importance that it was meet that the court should put forth its original prerogative jurisdiction to "shield the sovereignity of the state itself from violation." The court further held that the right of representation, as secured by the state constitution, was struck down by the legislation complained of, and that the enactment imperiled the liberties of the people, within the meaning of that phrase as used by Chief Justice Ryan in *Re Pierce*, 44 Wis. 431, 443.

But mark the contrast between the facts presented in *State* v. *Cunningham* and those brought to our attention in this case. We have seen that the commissioners of Burleigh county, by a resolution placed upon their records, have created or attempted to create certain voting precincts, four in number, within the city of Bismarck, and that such precincts are not coincident with the boundaries of the various wards of the city, but, on the contrary, the precinct lines overlap the boundaries of the different wards of the city. But the further fact appears that more than 10 years prior to the adoption of the said resolution the commissioners had divided the city into three voting precincts, which precincts, like those com-

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plained of, did not correspond to ward lines, but did overlap and run into different wards. All general elections held during the decade last past have been held in the three election precincts above mentioned, and we look in vain for an averment or a suggestion in the petition showing or tending to show that the elections held in said precincts during said decade were set aside or held invalid on account of the fact that said three precincts overlap, or did not correspond to the ward lines of the city. Counsel make no such claim. Nevertheless, if the precincts here complained of, four in number, are illegal precincts, it is because the same were established by the commissioners, and do not, in their boundaries, correspond with the lines of the city's wards. This is true of the last group of voting places as created by the commissioners, and was equally true of the former group. But, as has been said, nothing appears in the petition tending to show that a single candidate was ever, in fact, defeated, or that a single elector has been deprived of his vote, as a result of said grouping of election precincts by the commissioners. But counsel claim that the original group of voting places was in fact illegal, and that those in question are likewise unauthorized and illegal. In support of this contention counsel cite section 2252 of the Revised Codes of 1899. Upon the facts shown, counsel, construing said section, claim, and very forcibly argue, that each ward in the city of Bismarck is itself an election precinct, and one created by the very terms of the statute; and further argue with equal force that, if any new or different voting precincts are at any time necessary within the city, that direct authority to create such new precincts is vested by the statute in the city council, and hence the council alone has authority to act in such contingencies.

But we will not amplify upon the views of petitioner's counsel, for the reason that this court has reached the conclusion that for all purposes of this case the court will assume (without attempting to decide the point) that the views of counsel upon the construction of said section of the statute are correct, and that voting precincts within the city of Bismarck, upon the facts stated in the petition, are measured by ward lines, and this by the very terms of section 2252, supra. But while the case will be decided upon this assumption, it is but just to counsel representing the defense to state their contention also. They contend that the creation of the four precincts in question was necessary, or at least proper, for reasons which are practical; and, further, that such action of the commissioners has legal warrant in the statute. The practical considerations are stated in the brief for the defense as follows: "The action of the county commissioners in creating the precincts was legal, for it is impossible literally to comply with the statute declaring each ward in the city a different election precinct. Because of the fact that a portion of the city lies in the First county commissioner district and the other portion in the Second county commissioner district, it is

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not practicable to have each ward distinct, for the reason that the First, Second and Third wards lie each on both sides of the county commissioner district line. If each ward was to constitute an election precinct, it would be necessary in the First, Second, and Third wards to have two ballot boxes, in one of which all persons living in that part of the ward south of the line would vote for the county commissioner of that district, and in the other one all persons living north of that line would vote for the county commissioner in the other district. As the ballot is an entirety, and cannot be separated into different parts, the ballots of all persons north of the line would have to be placed in one box, and all persons south of the line in the other box. The statute plainly contemplates that there should be but one ballot box in each voting precinct, except that there should be a separate ballot box for the sole purpose of receiving the votes of women. Sections 520, 522, Rev. Codes. Another complication is that the ballots sent to these three precincts would have to have on them the names of the two different sets of candidates for county commissioners,—a portion of the ballots having the names of the candidates for the Second district, and the other portion for the names of the candidates for the First district. Again, who is to decide, and how can the decision be made, touching the persons who shall vote the one ballot and who shall vote the other, and who is to decide in which of the two ballot boxes the ballots are to be placed?" As to the legal authority of the commissioners to create the precincts in question, counsel say: "It is perfectly plain from the provisions of section 481 of the Revised Codes that the spirit of the law, and, indeed, the words of the law, requires in a case such as this that that portion of the city located in the First commissioner district should be made a voting precinct by itself, and that, inasmuch as the balance of the city cannot be laid out into precincts by ward, the county commissioners must use sound judgment in determining how the precinct shall be created." However, we shall not attempt in the present case to analyze or construe the provisions of section 481 of the Revised Codes, cited by counsel for the defendants, and shall refrain from so doing because, as will be hereafter shown, this court will decline to assume original jurisdiction in this case, and will leave an adjudication of the very important questions relating to the merits of the petition to be determined in due course by proceedings to be instituted in the district court, which tribunal possesses undoubted original jurisdiction in this and all similar cases.

Reverting to the statement of facts as set out in the petition, it becomes necessary, in disposing of the case, to particularly mention certain facts which are omitted from the petition. First. The petition embraces no charge of fraud against either the county commissioners who adopted the resolution creating the precincts complained of, nor against the inspectors of elections or the county auditor, who are made defendants in this proceeding. In other words, the petition omits to allege that any actual fraud has been

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committed, or that any actual fraud is threatened or contemplated, by the defendants. It is further true, and, we think, important, that the petition omits to allege in terms that if the defendants, the inspectors of elections, shall, pursuant to the authority contained in said resolution of the commissioners, proceed to open the polls and hold an election within the city of Bismarck, it will follow as a result of such action that any elector of the city will be deprived of the right to vote, or that the interests of any candidate for office will be injuriously affected thereby, or that any elector or any candidate will be subjected to any inconvenience or disadvantage as a result of holding such contemplated election in said precincts. It follows that this court cannot, in the absence of specific averments to that effect, indulge the presumption that the rights of either the voters or candidates for office in question are in any jeopardy in the premises, unless such an inference is necessary to be drawn from the facts which are alleged in the petition. But it is substantially alleged, and this court will assume, for the purpose of disposing of the motion to quash, that the precincts attempted to be created by the recent action of the county board were created without legal authority, and are illegal precincts, and, consequently, that the election sought to be enjoined in such precincts will, if permitted to be held, be an irregular election. Conceding this, the question is presented whether such irregular election, if held, will be so far vitiated by its illegality that, in the event of a contest, the lawful voters will lose their votes, and the election itself be set aside by a court of competent jurisdiction. It is our opinion that no such inference can be drawn from the facts set forth in the petition. Upon the argument counsel for the petitioner were requested to point to any statutory provision or decided case which would warrant a court in annulling the election for illegality if the same should be held within the disputed precincts. In response to this request counsel did not cite any authority to this court upon which any such decision could be sustained. On the contrary, counsel for petitioner content themselves by declaring that the precincts in question are illegal and ultra vires, and that, for this reason alone, this court should assume original jurisdiction, and by its prerogative writ enjoin the inspectors from holding the election contemplated, and which they were appointed to hold. It is true that counsel in their brief put a suppositious case, under which they claim that electors may be disfranchised. They say a voter living in a ward of the city might remove to another residence in the same ward, and that in such case the voter would be deprived of his voting privilege because a period of 90 days would not elapse between the date of the resolution creating the precincts in question and the date of the general election. The petition is silent as to any such state of facts, but, if any such case exists in the city, it is our opinion that the voter would not be disfranchised. A voter who has not removed from a voting precinct cannot be disfranchised by the action of officials who change the

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boundaries of precincts, whether such officials act with or without authority. The constitutional right to vote cannot be thus defeated. *Peard* v. *State,* 34 Neb. 373, 51 N. W. Rep. 828; *Duncan* v. *Shenk,* 109 Ind. 26, 9 N. E. Rep. 690.

Finally, we hold, for the purposes of the motion under consideration, that the proposed election in the precincts in dispute, if actually held, will not be an invalid and wholly void election, but will be merely an irregular election, and one which, in our opinion, cannot so operate as to have any injurious effect upon any substantial rights of voters or of candidates. It is elementary that mere irregularities in conducting an election which is fairly conducted, and which do not defeat or tend to defeat an expression of the popular will at the polls, will not so operate as to vitiate an election. To this rule there is an important exception. Where the statute in terms declares or necessarily implies that any particular act or omission shall defeat an election, the same is construed as a mandatory statute, and every such statute is required to be enforceable strictly in accordance with its terms. In the case of *Perry* v. *Hackney,* 90 N. W. Rep. 483, this court pointed out in the light of authority the distinction between requirements of the election statute of this state which are mandatory and other requirements which are merely directory, and this court then said, which is strictly in point here, referring to an admitted disregard the terms of the election law on the part of the precinct officers: "Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach the end; and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voter's choice." In the case at bar no acts of fraud are charged, and no claim is made that the statute anywhere in terms or in effect declares that any or all of the irregularities complained of will defeat an election. It follows that no such result need be anticipated. On the other hand, the cases cited below are squarely in point to the effect that the particular irregularities complained of will not operate to defeat an election. *Davis* v. *State,* 75 Tex. 420, 12 S. W. Rep. 957; *Bell* v. *Faulkner,* 84 Tex. 187, 19 S. W. Rep. 480.

It must follow, therefore, that no results which are important or which can possibly affect the state, its prerogatives, or its franchises, or the liberties of the people, can be anticipated as a result of holding the election which is sought to be enjoined by this proceeding. Under such circumstances this court, under the established rules of procedure, cannot put forth its original jurisdiction by using its prerogative writ of injunction. The mere fact that illegal action is anticipated is not enough to warrant the issuing of any prerogative writ. True, this court has taken original jurisdiction in *State* v. *Lavik,* 9 N. D. 461, 83 N. W. Rep. 914, and in

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other cases of a similar nature arising under the election laws of the state. But in the cases referred to the right of the masses of voters to vote for the regular nominees of their party was directly and vitally involved. Nothing at all similar is presented in this proceeding, and hence these cases are not in point upon the question of jurisdiction.

Leave to file the information must be denied, and the proceeding will be dismissed. All the judges concurring.

(91 N. W. Rep. 955.)

MAYNARD CRANE *vs.* JOHN T. ODEGARD.

Appeal from Part of Judgment.

In this action a judgment was entered in the district court, which as to one feature was wholly favorable to the defendant and unfavorable to the plaintiff, and as to another feature was wholly favorable to plaintiff and unfavorable to the defendant. The plaintiff attempted to appeal to this court from said judgment, and served a notice of appeal and an undertaking upon respondent's counsel. The notice of appeal is set out in the opinion, and shows upon its face that the appeal was attempted to be taken from one, and only one feature or portion of the judgment, viz., that which was adverse to the plaintiff. *Held*, under the rule established in Prescott v. Brooks, (N. D.) 90 N. W. Rep. 129, that the attempted appeal was abortive.

Appeal from District Court, Griggs County; *Glaspell*, J.

Action by Maynard Crane against John T. Odegard. Judgment for defendant, and plaintiff appeals. Dismissed.

J. E. Robinson, for appellant.

Newman, Spalding & Stambaugh, for respondent.

WALLIN, C. J. This is an action to quiet title to certain lots in the town of Cooperstown, Griggs county, N. D., to-wit, certain lots in blocks numbered 57, 58, 75, 76, 77, and 78. The complaint alleges ownership of the lots in the plaintiff, and for relief demands that the defendant answer the complaint and set forth his adverse claims to the lots "under and by virtue of any tax sale, tax certificate, or tax deed." Defendant answered the complaint, and alleged that the defendant, under certain tax deeds described in the answer and which were issued to defendant, is the owner in fee simple of all the lots in question, which are situated in said blocks 57, 75, 76, 77, and 78, and that the defendant claims an interest in all the lots situated in said block 58 under and by virtue of divers tax certificates issued to the defendant pursuant to divers tax sales of said lots in block 58. Upon the issues so framed a trial was had in the district court without a jury, which resulted in the entry of a judgment as follows:

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"Now, on motion of Newman, Spalding & Stambaugh, attorneys for the defendant, it is ordered, adjudged, and decreed that the defendant is the owner in fee simple of each of the lots numbered from one (1) to twenty-four (24), inclusive, in each of the blocks numbered fifty-seven (57), seventy-five (75), seventy-six (76), seventy-seven (77), and seventy-eight (78), in the town site of Cooperstown, in the county of Griggs and state of North Dakota, as appears from the recorded plat thereof on file in the office of the register of deeds in said county. It is further ordered, adjudged, and decreed that the defendant's title to each of said lots in fee simple be, and the same is hereby, quieted and confirmed. It is further ordered, adjudged, and decreed that the adverse claims of the plaintiff thereto are wholly void, and said claims are hereby cancelled and annulled, and the said plaintiff and all persons claiming under him are hereby forever enjoined from asserting any right, title, or interest of, in, or to either of said lots. It is further ordered, adjudged, and decreed that each of the sales of each of the lots contained in block fifty-eight (58) of said town site of Cooperstown in the years 1891, 1893, 1894, 1895, and 1896, and the certificates issued to the defedant upon such sales, are void, for the reason that there was included in the tax levy of said Griggs county in each of the years, for the taxes of which said lots were so sold, a sum in excess of that allowed by law to be levied. It is further ordered, adjudged, and decreed that each of said sales of each of the lots contained in said block fifty-eight (58), and each of said certificates issued thereon, be, and the same is hereby, vacated, canceled, and set aside. It is further ordered, adjudged, and decreed that the defendant have and recover of the plaintiff herein his costs and disbursements, amounting to twenty-nine and 30-100 dollars."

This judgment, as appears on its face, is wholly favorable to the defendant and adverse to the plaintiff, except that the court adjudged that the tax sales and tax certificates of the lots situated in block 58 were illegal and void, and the same were vacated and set aside by the judgment. In this last-mentioned feature the judgment was, of course, wholly favorable to the plaintiff and wholly adverse to the defendant. It was stipulated at the trial that plaintiff was the owner of all the lots in question, except so far as the defendant had an interest in or owned the same by virtue of the tax certificates or tax deeds set out in the answer. It is clear, therefore, that under the terms of the judgment as entered in the court below the plaintiff became, and was in legal effect declared to be, the sole owner of the lots in block 58, and that the tax sales and tax certificates set out in the answer, as to all lots in block 58, were canceled and set aside, as clouds upon the plaintiff's title thereto. This judgment was entered on October 12, 1900. Later, a statement of the case was settled, and thereafter the plaintiff appealed, or attempted to appeal, from the judgment to this court, by serving and filing notice of appeal and an undertaking, which were served on October 1,

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1901. The notice of appeal is as follows:

"Notice of Appeal. Please take notice that Maynard Crane, the plaintiff, appeals to the supreme court of the state of North Dakota from the judgment of said district court entered herein on the 12th day of October, 1900, which judgment is to the effect that the defendant is the owner in fee simple of lots 1 to 24, inclusive in blocks 57, 75, 76, 77, and 78, in the town of Cooperstown, in Griggs county, North Dakota; and that the plaintiff is the owner of the several lots contained in block 58, of Cooperstown, North Dakota; and that the defendant do have and recover from the plaintiff the costs of the action, taxed and allowed at twenty-nine dollars and thirty cents. And the plaintiff appeals from the whole and every part of said judgment, excepting so far as the same pertains to said lots in block 58 of the town of Cooperstown, N. D. And with that exception said appellant desires the supreme court to review and retry the entire case. Dated 30th day of September, 1901. J. E. Robinson, Attorney for Plaintiff and Appellant.

"To the Clerk of Said District Court, and to Newman, Spalding & Stambaugh, Attorneys for Defendant."

The undertaking filed embodies the following paragraphs:

"Whereas, on the 12th day of October, 1900, in the said district court, the said John T. Odegard recovered a judgment in this action to the effect that he is the owner in fee simple of all the lots in blocks 57, 75, 76, 77, and 78, in the town of Cooperstown, in Griggs county, state of North Dakota, and that he recover from the plaintiff the costs of this action, taxed at twenty-nine dollars and thirty cents;

"And the above-named Maynard Crane, appellant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the state of North Dakota."

In due course the case reached this court, and was on the calendar for disposition at the regular term of this court held in March, 1902; and when the case was called counsel for the respondent submitted three separate motions in the action, which were respectively argued by counsel on both sides. Only two of these motions need be here referred to. The first was a motoin to dismiss the appeal; the other was a motion to strike from the files the statement of the case and to affirm the judgment. The motion to dismiss the appeal was denied and the motion to strike the statement from the files and affirm the judgment was granted, and, pursuant to this ruling, an order of this court was entered, striking out the statement and affirming the judgment, and denying the motion to dismiss the appeal. Later, and upon the petition of counsel for the plaintiff, the court entered an order granting a rehearing as follows: "Ordered and adjudged that the petition be, and the same is hereby, granted, and said cause will stand for reargument at the September, 1902, term, at Grand Forks." Pursuant to this order, counsel on both sides appeared in this court and submitted

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oral arguments and filed briefs, both upon the motion to dismiss the appeal and the motion to strike out the statement and affirm the judgment.

With respect to the motion to dismiss the appeal, counsel for the appellant contend that the matter is res judicata; and this contention is placed by counsel upon the ground that the appellant did not petition for a reargument of the motion to dismiss the appeal and does not desire to reargue said motion. It is true that the plaintiff, for obvious reasons, did not desire a rehearing of the motion to dismiss, and did not petition for such rehearing; but it is further true that this court has undoubted control of the entire matter of directing rehearing of causes which have been submitted in this court, and that it has plenary authority under which it may, either with or without a petition to do so, direct counsel to reargue either the whole case or any specified question in a case. In this case the order was that "said cause will stand for reargument." It will be noticed that this order did not, on the one hand, restrict the reargument to any particular point or feature of the cause, and, on the other hand, its terms were broad and included the cause,—i. e., the whole case in its entire scope. But there is another consideration which is equally conclusive against this contention of counsel. A motion to dismiss an appeal attempted to be taken to this court is fundamental, and strikes at the jurisdiction of this court to consider the case on its merits. In all such cases it is the right and the duty of this court, as long as the court has control of the case, to inquire into the question of its own jurisdiction; nor for such an inquiry does it matter how or in what manner the attention of the court is directed to the question, and it is unimportant whether the court discovers a lack of jurisdiction at an early or late period in its investigation of the questions presented by the record. We therefore overrule this contention of counsel.

Upon the merits of the motion to dismiss, our views have undergone an entire change as a result of the reargument and of a more careful reinvestigation of the data embraced in the record bearing upon the question presented by the motion. After a more mature deliberation, the members of this court are unanimous in the opinion that, under the rule established by this court in the recent case of *Prescott* v. *Brooks,* 90 N. W. Rep. 129, the motion to dismiss must be granted, upon the ground that the appeal was taken from only a portion of the judgment, and was not taken from the whole judgment. It is our opinion that every aspect of the appeal, including the terms of the notice of appeal and those of the undertaking served with the notice, point to the conclusion we have reached. Reverting to the terms of the notice, it is entirely clear, at least to our minds, that if the appellant, as his counsel contend, intended to appeal from the whole judgment, all the language embraced in the body of the notice after words "October, 1900," was superfluous and worse than useless. But this notice contains an exception which excludes the

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theory that the plaintiff appealed, or intended to appeal, from the whole judgment. The language is this: "And the plaintiff appeals from the whole and every part of said judgment, excepting so far as the same pertains to said lots in block 58, of the town of Cooperstown." The language last quoted is not ambiguous or obscure in meaning, and it clearly imports that the appellant did not appeal from that portion of the judgment pertaining to "said lots in block 58 of the town of Cooperstown." Going back to the judgment, we discover that the same embraced separate and divisible features, and that one feature of the judgment exclusively dealt with the lots contained in block 58, and as to this feature the same was wholly favorable to the plaintiff, and hence the same must have been satisfactory to the plaintiff. True, the judgment did not, in terms, declare that the plaintiff was a sole owner of the lots in block 58, and such ownership was technically denied by the answer. Nevertheless, a perusal of the answer shows that the defendant averred no claim of ownership as to any of said lots in block 58; but, on the contrary, defendant's only claim thereto, as set out in his answer, was based upon certain tax sales and certificates which were canceled and vacated by the judgment, and which, of course, were mere clouds upon the title, and were not muniments of title. There was no occasion, therefore, to ask a retrial of any question pertaining to the lots in block 58. The general ownership of the plaintiff was conceded by stipulation, and the judgment set aside all clouds alleged in the answer as to the title of said lots. The mistake in framing the notice undoubtedly was the result of a construction placed upon the language of section 5606 of the appeal law (Rev. Codes, p. 1016); and, in justice to counsel who drew the notice, the fact should be stated that the notice was framed long prior to the decision made by this court in the case of *Prescott* v. *Brooks*, supra. We hold that the terms of the notice are decisive of the motion, and yet, if we were inclined to explore the record for collateral proof of the intention of the appellant, there is ample in the record to corroborate the theory that the appellant did not appeal, or intend to appeal, from the whole judgment. But we will go no further in this direction than to call attention to the language of the undertaking, as above set out, and to note the fact that such language by its terms confines the appeal to matters in the judgment which are adverse to the plaintiff, and makes no reference to any matter contained in that feature or porton of the judgment relating to lots in block 58. It is, of course, regrettable and unfortunate that this court did not reach its present conclusions upon the motion to dismiss the appeal when the motion to dismiss was first considered and decided. Had it done so, much labor of both court and counsel would have been avoided. But this court prefers to be right in its conclusions, even when to be right involves a reversal of its former views. That our final conclusion upon the motion to dismiss is right we have no doubt whatever, under the rule established in the

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case cited. It is further true that the appellant's position with reference to the right of appeal is no worse than it would have been if the motion to dismiss had been properly decided on the day it was first presented to this court for decision.

It follows that the order of this court striking out the statement of the case and affirming the judgment was made without authority or jurisdiction to make the same, and an order will therefore be entered revoking the same, and a further order will be entered dismissing the attempted appeal to this court. All the judges concurring.

(91 N. W. Rep. 962.)

E. E. WHEELER *vs.* ED. CASTOR.

Default Judgment—Excusable Mistake.

In this action, judgment was taken by default. The summons was served only on the defendant Castor, and the copy delivered to Castor was signed by one W. H. Smith, of Michigan, N. D., as attorney for the plaintiff. But his initials (W. H.) were so obscurely, ambiguously and illegibly written that the same could fairly be read as either B. M., B. M. A., or W. H. The defendant and his attorney, acting in good faith, construed the signature to be that of B. M. Smith, and defendant's attorney, in due course, made diligent efforts to serve notice of appearance and obtain a copy of the complaint from B. M. Smith, of Michigan, N. D.; but no copy of the complaint was obtained, and B. M. Smith was not found. The judgment was entered January 28, 1901, in Nelson county, and later a transcript was docketed in Towner county, and defendant first learned of the existence of the judgment from the record thereof in Towner county. On July 10, 1901, defendant served notice of a motion to vacate the judgment and, after hearing counsel, the district court, by its order, vacated the judgment, and, in effect, granted a new trial. The plaintiff appeals from said order. The motion papers embraced the record of the judgment, and, in addition to showing diligence and excusing defendant's failure to appear in the action, contained a proper affidavit of merits. The affidavit also contained a statement to the effect that the defendant had a good and valid defense to the cause of action stated in the complaint, viz., that said cause of action was barred by the statute of limitations. No proposed answer was served. *Held*, for reasons stated in the opinion, that the order appealed from was properly made.

Answer—Defense Must Go to the Merits.

Held, further, that, in addition to a sufficient technical affidavit of merits, the moving party (appealing to the favor) must set out a defense which goes to the merits of the action, and that strict practice requires that such showing of merits should be made by a proposed answer, verified, served and filed with the motion.

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Court May Accept Affidavit in Lieu of Answer.

Held, further, that, where a valid defense to the merits of the action is set out by affidavit, it is discretionary with the trial court to accept such affidavit in lieu of a verified answer.

Diligence—Moving Party Must Show—Failure Fatal.

Held, further, that in this class of cases the burden is upon the moving party to show diligence in seeking relief, and a failure to do so is fatal to the application.

Judicial Discretion.

Held, further, that where the application is made under section 5298, Rev. Codes 1899, it is addressed to the sound judicial discretion of the trial court, and in such cases the order of the court below will not be disturbed unless it clearly appears that the same involves an abuse of discretion.

Order Directing New Trial on Merits not Disturbed.

Held, further, that such orders are seldom disturbed by a reviewing court where the court below, in granting relief, directs a trial anew on the merits.

Statute of Limitations not Regarded with Disfavor.

Held, further, that the statute of limitations is not, under modern authority, regarded with disfavor by the courts, but is regarded as a plea of equal merit with other lawful defenses to an action.

Appeal from District Court, Nelson County; *Fisk*, J.

Action by E. E. Wheeler against Ed. Castor and others. Judgment for plaintiff. From an order setting aside the same, he appeals. Affirmed.

W. H. Smith and *Henry G. Middaugh* (*Cochrane & Corliss*, of counsel), for appellant.

Brooke & Kehoe, for respondents.

WALLIN, C. J. The record in this action shows that on January 28, 1901, a default judgment was entered in the court below in favor of plaintiff and against the defendant Castor; that a notice of motion, to be heard on July 31, 1901, to vacate said judgment, was on July 10th served on plaintiff's counsel in behalf of said defendant Castor; and that subsequently the district court, after hearing counsel upon the motion, entered an order vacating and setting aside the judgment, and awarding a new trial. From said order, plaintiff has appealed to this court. Error is assigned upon the order.

The moving papers submitted to the trial court in support of the application to vacate the judgment, in addition to the notice of motion and the record in the action, consisted of the affidavit of the defendant Castor and of his attorney, James V. Brooke. The affidavit of the defendant is as follows: "Ed Castor being duly sworn, on oath deposes and says as follows: (1) I am the Ed Castor who is one of the defendants in the above-entitled action. (2) That the summons in this action was served upon me some time during the first two weeks of December, 1900. (3) That thereafter I consulted my attorney, Jas. V. Brooke, of Cando, N. D., and

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within the time prescribed by law caused a notice of appearance in said action, and demand for a copy of the complaint, to be served on plaintiff's counsel. (4) That no copy of the complaint was served with said summons; that the summons served on me was signed by one B. M. Smith, attorney for the plaintiff, who gave his residence as 'Michigan, North Dakota,' and without the addition of any other words to indicate whether it was Michigan City, or some post office by the name of 'Michigan.' (5) That said demand for a copy of the complaint and notice of appearance was sent by registered mail to said B. M. Smith, at Michigan City, by defendant's attorney, on December 27, 1900, and was in due time returned by the postmaster at Michigan City, 'Unclaimed.' (6) That my attorney then wrote on January 19, 1901, to one Fred Kelley, a practicing attorney at Lakota, the county seat of Nelson county, an inquiry to ascertain if a complaint had been filed, and received an answer from said Kelley that no complaint or other paper had been filed. (7) That my case was fully and fairly stated to said Jas. V. Brooke, my attorney, who resides at Cando, Towner county, N. D.; and, after such statement, I am and was advised that I have a good and substantial defense on the merits of the action, and I verily believe the same to be true. (8) That my defense to said action is 'that the cause of action set forth in said complaint did not accrue within six years before the commencement of this action'; that said suit or action was on a note long ago barred by the statute of limitations. (9) That defendant, relying on the fact that there was no response to the demand for a copy of the complaint, or acknowledgment of the appearance of his attorney, supposed the matter was held up or dropped. (10) That he never knew such judgment had been taken against him until its accidental discovery on the judgment docket of this county. (11] That his neglect in not putting in an answer grew out of the fact that the letter demanding a copy of the complaint was returned, 'Unclaimed,' and no copy of the complaint was ever served on me or my attorney." The affidavit of James V. Brooke is as follows: "I, Jas. V. Brooke, being first duly sworn, on oath depose and say: (1) That I am an attorney at law duly qualified to practice in all the courts of the state of North Dakota, located and having my place of business in Cando, Towner county, North Dakota; (2) That on or about December 24, 1900, Ed. Castor, known to me to be one of the defendants in the above entitled action, came to my office, and showed and handed to me the summons hereto attached, marked 'Exhibit A'; that affiant read the same, and inquired if a copy of the complaint had been served therewith, and was informed by said Castor that no copy had been served; that affiant inquired fully into the merits of said action, and, in addition to other defenses, informed the defendant that he had a complete defense to said action, in the plea of the statute of limitations. (3) That said Castor then and there employed me to act as his attorney, and was informed that the first thing he must do was to serve notice of appearance, and demand a copy of

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the complaint. (4) That thereupon I addressed an envelope to 'B. M. Smith,' and mailed by registered letter therein a notice of appearance and demand of a copy of the complaint. This was on December 27, 1900, as will appear from the post-office receipt therefor, hereto attached, marked 'Exhibit B.' (5) That I received no response to said letter, no copy of the complaint, or other acknowledgment, until some time about the 20th of January, 1901, when the same was returned to me, unclaimed, from the postmaster at Michigan, N. D. The original envelope and inclosure, with the post-office notation thereon, is herewith returned, marked 'Exhibit C.' (6) That on or about January 19, 1901, I, not understanding this, wrote to Fred Kelley, at Lakota, asking him if any papers had been filed, or complaint, as set out in summons, and some time after received his reply that there was no such complaint or other papers on file in the clerk's office of the clerk of the district court at Lakota, Nelson county, N. D. (7) That I then ascertained that there was an attorney at Michigan City named W. H. Smith; that I then inspected the summons again, and found the signature such as the original shows; that I verily believed at the time I mailed the notice of appearance and demand of a copy of the complaint that the signature was 'B. M. Smith.' I believe it now to be 'W. H. Smith,' but not from anything disclosed by the signature. (8) That at the time I knew of no one named Smith, an attorney at Michigan City, and I had only the signature to the summons to guide me; that I then had to guess at the post-office. (9) That at the time I ascertained that there was a W. H. Smith, an attorney at Michigan City, long over thirty days had elapsed since the service of the summons. (10) That, about the time I so ascertained, the said plaintiff, on January 28, 1901, recovered a judgment by default against this defendant in the district court of Nelson county, N. D., for $145.65, and $9.80 costs,—in all $155.45. This judgment was docketed in the office of the clerk of the court of Towner county on a transcript from Nelson county. It was from this that we discovered accidentally that such a judgment had been taken. (11) That I believe that the defendant has a complete defense to said action in the plea of the statute of limitations; the note on which said action is brought being, I am informed and believe, over thirteen years old, and never renewed by partial payment or in any other way, to stop the running of the statute. (12) That the failure to answer was caused by my having inadvertently and excusably been led into the mistake as to the signature of plaintiff's counsel; that this mistake was the reason of plaintiff's counsel's failure to receive my notice of appearance, and demand for a copy of the complaint, and consequently of his failure, I presume, to serve a copy of the complaint. (13) That this affidavit is made in good faith, and not frivolously or for mere delay; that I used all diligence to secure a copy of the complaint, and, had I done so, would assuredly have filed an answer in time."

The record embraced, among other papers, the copy of the sum-

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mons served upon Castor. This was in proper form, except as to the signature of the plaintiff's attorney. Subjoined to the signature was the following language: "Attorney for plaintiff. Residence and postoffice address, Michigan, North Dakota." The surname of plaintiff's attorney, Smith, was legibly written next above the language we have quoted. The defect in the signature consists in the illegible manner in which the initials of the attorney are written. The initials appear to have been written without raising the pen from the paper, and the letters are so combined and blended together that it is difficult, if not impossible, to say what the initials are; and this difficulty was enhanced by the fact that the defendant, when the summons was served, had no acquaintance with an attorney named W. H. Smith, who resided at Michigan, N. D. Nor did Castor's attorney know any such attorney. It appears that James V. Brooke, the attorney retained by the defendant, and to whom the copy of the summons was delivered, while acting in good faith, construed the signature to be that of B. M. Smith, and acting upon that construction, proceeded to serve notice of his retainer, and to demand a copy of the complaint, in the mode and manner fully detailed in the affidavits above set out. The copy of the summons is before this court, and the same has been examined by all members of the court, and we have reached the conclusion that the signature of the plaintiff's attorney as affixed to the copy of the summons is so ambiguous and obscurely written that it may fairly be construed to read either "B. M. Smith," "W. H. Smith," or "B. M. A. Smith." Hence we are of the opinion that the attorney for the defendant, who attempted to serve notice of his retainer upon the plaintiff's attorney in the manner set forth in said affidavits, was acting in good faith and with reasonable diligence in his endeavors in that direction. We shall therefore, upon this record, rule, without recapitulating the facts embodied in the affidavits, that the moving papers submitted to the trial court fully excused the defendant's default in not answering the complaint; and we are further of the opinion that counsel for the plaintiff, by his negligence, became, and that he was, wholly responsible for the defendant's default, and, further, that the judgment entered by default was irregularly entered, by reason of the negligence of the plaintiff's attorney in his attempt to sign his name to the copy of the summons served on the defendant. We find, under these circumstances, that the default judgment was, by the fault and negligence of the plaintiff's attorney, irregularly entered, and also that the defendant has excused his failure to appear in the action in time to prevent the entry of a default judgment.

This leads up to a consideration of another and more difficult question. It is this: Did the defendant, by his moving papers, place himself in a position before the trial court which, under the statute and the established practice, entitled the defendant to the relief which he sought? We observe first that the mere fact that the judgment was irregularly entered was not, standing alone, enough

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to justify the court in vacating the same. The judgment was entered without fraud and by a court of competent jurisdiction, and hence there would be no propriety or justice in vacating the same unless a satisfactory showing was made by the defendant that he was prejudiced in his substantial rights by the entry of the judgment. Upon this point there is abundance of authority. In *Kirschner* v. *Kirschner*, 7 N. D. 291, 293, 75 N. W. Rep. 252, this court said: "Decrees will not ordinarily be opened to let in technical defenses. The defense must go to the merits." In the case at bar the defendant attempted to comply with this well-established rule. In the affidavits submitted, defendant set out an affidavit of merits, and also set out the defense which he claims to have as against the cause of action stated in the complaint. The form of the affidavit of merits is not criticised by the appellant's counsel, and we shall rule that while it is, perhaps, not technically in the best form, it is sufficient in substance. The defense upon the merits is set out in the defendant's affidavit as follows: "That my defense to said action is that the cause of action set forth in said complaint did not accrue within six years before the commencement of this action; that said suit or action was long ago barred by the statute of limitations." It is not contended by counsel that the above quotation from the defendant's affidavit does not embody a defense which, if properly and seasonably pleaded by an answer, and proved at the trial, would defeat the plaintiff's recovery, but this defense is attacked upon the twofold ground that the same was not set out by a proposed answer, duly verified: and, secondly, that the defense—the statute of limitations—is not a meritorious defense, and hence does not comply with the rule which requires the moving party to show merits as a prerequisite of relief.

Neither of the questions presented by this contention of counsel has been directly passed upon in this jurisdiction, and the same are therefore important, as bearing upon the question of the proper procedure in this class of cases. True, this court said in a case similar to this, in which the moving party served both an affidavit of merits and an answer setting out a defense, that the moving party had "pursued correct practice." See *Manufacturing Co.* v. *Holz*, 10 N. D. 16, 25, 84 N. W. Rep. 581. We are still of the opinion that in strict practice a proposed verified answer should be served and submitted by the moving party, but the crucial question in this case is whether a defense to the merits, when embodied in an affidavit, merely, and not in a proposed answer, will be a substantial compliance with the rule requiring a defense on the merits to be shown. The authorities are in conflict upon this question, and the point has never been passed upon by this court. In *Gauthier* v. *Rusicka*, 3 N. D. 1, 53 N. W. Rep. 80, it was held error to vacate a judgment under section 4934, Comp. Laws, without an affidavit of merits, the answer being unverified. In *Sargent* v. *Kindred*, 5 N. D. 8, 63 N. W. Rep. 151, there was a verified answer, but no affidavit of merits. In that case the trial court was reversed, only two judges sitting in the case.

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Both judges wrote opinions in which they reached the common conclusion that the order vacating the judgment should be reversed. Judge Bartholomew based his conclusion upon independent ground, not connected with any question either of an answer or an affidavit of merits. Judge Corliss did not agree with the views of Judge Bartholomew as to the grounds of his conclusions, and, in a valuable concurring opinion, placed his concurrence in the reversal upon the fact that the moving party had omitted to submit an affidavit of merits as well as a verified answer. But the question presented here was not involved in that case, inasmuch as no answer was submitted in this case; and in this case there is an affidavit of merits, and no such affidavit was presented in the case last cited. In *Kirschner* v. *Kirschner*, 7 N. D. 291, 75 N. W. Rep. 252, the vacating order was reversed because no sufficient affidavit of merits was presented to the trial court. This review of the cases decided by this court shows that none of them are squarely in point here, because all widely differed in their facts from the case at bar; and hence we are neither aided nor hampered in deciding this case by precedents of our own creation, and are at liberty, therefore, to decide the case in harmony with our own views of right and sound practice. Nor do we think a presentation of the conflicting views of other courts would serve any useful purpose in this opinion. We shall rule in this case with a view to settling the practice in this state in motions to vacate default judgments under section 5298 of the Revised Codes of 1899, as follows: First, a sufficient affidavit of merits is indispensable in all cases; second, it is the proper practice to serve and submit a proposed verified answer with the moving papers, setting up a defense which is valid on its face; third, where a verified answer is not submitted, the trial court may, at its discretion, accept in lieu of such answer an affidavit setting out a valid defense to plaintiff's cause of action. Such an affidavit, in our opinion, would serve the purpose of an answer, and constitute a substantial compliance with the strict rule which requires the submission of a proposed verified answer, embracing a defense.

This leads up to the question whether the defense to plaintiff's cause of action, viz., the statute of limitations, which is set out in the affidavits submitted upon the motion, is a valid defense in a case such as this, where the application is addressed to the favor of the trial court, and does not, therefore, rest upon any inflexible rule of law, or strict legal right. In motions of this character the trial court exercises the powers of a court of equity, and hence will be governed in passing upon such motions by the principles which obtain in courts of equity. It is for this reason that the equitable rule is established in this class of motions that a default judgment, though irregular, will not be set aside to admit a defense which is essentially unjust, repugnant to fair dealing, oppressive, or purely technical.

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See *Gauthier* v. *Rusicka* and *Kirschner* v. *Kirschner, supra;* also individual views of Judge Corliss in *Sargent* v. *Kindred.* In the case at bar the only defense set out to plaintiff's cause of action is the statute of limitations. It is undeniable, in the light of authority, that the earlier rule, established by the adjudications of the courts of England, as well as those of this country, was that the statute of limitations is not a meritorious plea. In *Golden* v. *Hallagan,* 1 Wend. 302, this language was used: "That part of the motion which asks for leave to add a notice of set-off is granted, but the application to add the plea of the statute of limitations is denied, with costs. Such a plea is never allowed to be added after the issue is joined." In *Sheets* v. *Baldwin's Adm'rs,* 12 Ohio 120, the court say: "A default usually will not be set aside to permit a plea of the statute of limitations." See, also, *Morris* v. *Slatery,* 6 Abb. Prac. 74, and *Reed* v. *Cowley,* 20 Fed. Cas. 433 (No. 11,644). The rule of these cases was sustained by an array of authority, but such rule, in our opinion, is not the modern rule. The more recent, and, we think, the better, cases, have abrogated the rule. The modern judicial view is that the statute of limitations is one of reposè, and that as a defense the statute is now classed as meritorious, and as much so as other valid defenses. In *Campbell* v. *City of Haverhill,* 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 280, the court say: "Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of witnesses, and when their recollection may be presumed to be still unimpaired. As was said of the statute of limitations by Mr. Justice Story (*Bell* v. *Morrison,* 26. U. S. 351, 360, 7 L. Ed. 174), 'It is a wise and beneficent law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of the witnesses.'" In a recent South Dakota case (*Garvie* v. *Greene,* 70 N. W. Rep. 847) the following language is used: "The statute of limitations being a promoter of peace, tranquility, and diligence, suggested by and reposing upon the soundest principles of an enlightened public policy, the decisions are, we think, just, and of latest utterance, which hold that a litigant relieved from default should be restored to his former right to plead and rely upon all the defenses he may have, legal and equitable, or both, and that he may thus be relieved for the sole purpose of interposing the statute of limitations. The modern doctrine seems to be that where a judgment entered by default is opened, or leave is granted to answer, after the expiration of the time limited by statute, plaintiff's case is subjected to all the defenses that would have been available had no default ever existed. *Mitchell* v. *Campbell* (Or.) 13 Pac. 190; *Sossong* v. *Rosar,* 112

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Pa. 197, 3 Atl. 768." See, also, *Steel Co.* v. *Budzisz* (Wis.) 82 N. W. Rep. 534, 48 L. R. A. 830, 80 Am. St. Rep. 54; Freem. Judgm. § 542; 19 Am. & Eng. Enc. Law (2d Ed.) p. 151; *Benedict* v. *Arnoux,* 85 Hun. 283, 32 N. Y. Supp. 905. Under these authorities, we are constrained to hold that the statute of limitations can no longer be regarded with disfavor by the courts, and that as a defense it stands on a par with other legal and meritorious defenses.

Only a single feature of this case remains for consideration. Appellant's counsel claim that the defendant, in his moving papers, has failed to show diligence in moving to set aside the judgment after he discovered that it had been entered. The judgment was entered in Nelson county on January 28, 1901, and the notice of motion was served by defendant on July 10th of the same year. It appears that after the entry of judgment in Nelson county a transcript thereof was docketed in the county of Towner, and, further, that the existence of the judgment was "accidentally," and for the first time, discovered by the defendant from the record in Towner county. But the proof fails to disclose the date of such discovery. There is therefore nothing in the proof submitted showing affirmatively that defendant was to any extent negligent after he knew of the existence of the judgment. Nevertheless it is well settled, in cases of this kind, that the moving party has the burden of showing diligence, and unless it is shown affirmatively the court will not ordinarily exercise its discretion in his favor. See *Land Co.* v. *Dayton* (Minn.) 40 N. W. 66; *Gerish* v. *Johnson,* 5 Minn. 10 (Gil. 10). The rule which meets our approval is succinctly stated in 6 Enc. Pl. & Prac. p. 189, as follows: "It is not sufficient for the appellant to show a case within the statute of relief, and a good defense on the merits. He must also show proper diligence in prosecuting his remedy." And see authorities cited in note 2, Id. In this case diligence before ascertaining the existence of the judgment sufficiently appears, but the showing of diligence after such discovery is meager, and the same is not entirely satisfactory to this court. But a necessary inference from the proof submitted is that some uncertain interval of time elapsed after the entry of the judgment in Nelson county, and before a transcript was docketed in Towner county; and we think the inference may also fairly and reasonably be drawn from the proof that the discovery of the judgment was not made immediately after the filing of the transcript, but was made after the lapse of an interval of time of greater or less duration after the same was filed. We think, too, that it is a necessary inference from the proof that a reasonable period of time was requisite after the discovery of the judgment in Towner county in which to explore the judgment record in Nelson county. This was necessary in order to find the data upon which the motion to vacate was predicated, and, after such data was obtained, we are bound to infer that a further reasonable period must elapse, in which the advice of counsel could be sought and obtained. To this must be added

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a reasonable time for counsel to prepare and serve the papers after deciding upon a proper course to pursue in the case. Upon such a showing, we do not feel at liberty to rule that the trial court, in granting the relief, was clearly guilty in this case of an abuse of the discretion conferred upon that court by the statute which governs the case. The effect of the order appealed from is to afford the parties a trial de novo upon the merits, and in such cases a court of review is generally reluctant to disturb an order made within the domain of judicial discretion. See *Pengilly* v. *Machine Co.* (N. D.) 91 N. W. Rep. 63. Such orders are not, as a rule, disturbed by a reviewing court unless an abuse of discretion clearly appears. See 15 Enc. Pl. & Prac. 281, 282.

The order appealed from will be affirmed. All the judges concurring.

(92 N. W. Rep. 381.)

STATE *ex rel* GEORGE J. WALKER *vs.* MCLEAN COUNTY.

Quo Warranto—Correct Practice.

Quo warranto proceedings. In this proceeding the relator, George J. Walker, a private citizen, asks leave to file in this court an information in the nature of quo warranto; and counsel for the relator at the same time asks leave to file similar informations in behalf of two other private citizens against the counties of Pierce and McHenry, respectively. The several informations sought to be filed allege, in substance, that each of said counties has encroached upon a portion of the territory lying within the boundaries of Church county, and by their combined action have absorbed all of said territory, and that said counties are now, and since the year 1902 have been, unlawfully exercising governmental control, as counties, over all the territory of Church county. It is conceded that Church county has never been organized as a county, and that the action taken by the counties of McLean, Pierce, and McHenry was had under color of a statute, viz., under chapter 50, Laws 1891. For the purposes of the case, it is conceded that said statute is unconstitutional. The applications of relators are opposed by the attorney general of the state. The relators ask leave to file informations in the nature of quo warranto, and do not ask that the writ of quo warranto be issued. *Held*, construing section 87, Const., that in this respect the relators have pursued correct practice.

Proper Remedy against Municipal Corporations, When.

Held, further, in cases such as this, that this remedy may be resorted to where a municipal corporation has been guilty of usurping franchises by extending its corporate authority beyond its lawful boundaries.

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Jurisdiction—District Courts and Judges have Original.

Held, further, that, under the constitution of the state, district courts and the judges thereof have original jurisdiction in this class of cases, and may proceed by information, and the remedy is also fully attainable in such courts by a civil action. See Const., § 103; Rev. Codes 1899, § 5741.

Failure to Apply to District Court not Sufficiently Explained.

Held, upon the facts stated in the opinion, that sufficient reason is not shown in the moving papers why the relators did not seek for relief in the district courts having original jurisdiction.

Original Jurisdiction of Supreme Court—Exercised When.

Held, further, that the jurisdiction of this court is primarily appellate, and that when the original jurisdiction of this court is invoked, under section 87 of the state constitution, the prerogative powers of this court will only be put forth in defense of the state, its franchises, and the liberties of the people.

Remedy by Quo Warranto in Supreme Court not matter of Strict Right.

Held, further, that the remedy by quo warranto in this court is not a matter of strict right, and as such available to a private relator. In this court the remedy in all cases rests in the sound discretion of this court, and ordinarily the remedy will be withheld unless the same is sought in behalf of the state by the attorney general.

Application Denied.

For reasons stated at length in the opinion, the applications to file the informations are denied upon the merits.

Application by the state, on the relation of George J. Walker, for leave to file an information in the nature of quo warranto against McLean county, N. D. Application denied.

Henry S. Klein and *S. E. Ellsworth*, for relator.

O. D. Comstock, Atty. Gen., for defendant.

WALLIN, C. J. This is an application to this court for leave to file an information in the nature of quo warranto. The application is made on the relation of George J. Walker, a private person, who is represented in this court by his attorneys, Henry S. Klein and S. E. Ellsworth. The Honorable O. D. Comstock, attorney general, opposes the application. The papers presented to the court consist of a written motion, signed by the attorneys for the relator, to which is annexed an information, verified by the relator, and these are supplemented by the affidavit of said S. E. Ellsworth. Omitting formal parts, the motion is as follows: "Now comes the relator above named, by his counsel, and moves the court that he be allowed to file in this court an information in the nature of quo warranto, which is hereunto attached and herewith presented, and that the respondent named in said information be, by a writ of this court, required, at a convenient time and place, in said writ named, to answer thereto, and show by what authority it holds and exercises the powers and functions therein named and described over the inhabitants of the said territory therein described." The information is as follows: "The above-named relator, George J. Walker, re-

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spectfully gives the court to understand and be informed: First. That McLean county, the above-named respondent, is a municipal corporation regularly organized under and pursuant to acts of the legislative assembly of the territory of Dakota, enacted at its regular sessions in the years 1883 and 1885, and now existing as one of the counties of the state of North Dakota. Second. That your relator is a resident and taxpayer of that territory or district of country within the state of North Dakota, adjoining the said county of McLean, and described as follows, to-wit, townships 149 and 150 north, of ranges 74, 75, 76, 77, 78, 79, and 80 west of the fifth principal meridian, which said territory is all included in, and forms part of, the larger district of country that was by an act of the legislative assembly of the territory of Dakota, enacted in its regular session in the year 1887, created and constituted as the county of Church. The said territory above described has never at any time been legally annexed to said McLean county, or incorporated therein, by any valid or constitutional enactment. Third. In or about the year 1892 the said respondent, McLean county, without any warrant, grant, or authority of law whatsoever, usurped and intruded into, and from that time to the present has unlawfully held and exercised, governmental functions and franchises over the people of the said territory hereinbefore described, in levying and collecting taxes, and in claiming and exercising all the powers, franchises, and functions delegated to legally organized counties by the laws of the state of North Dakota, in, over, and upon the inhabitants and property of the said territory. Wherefore your relator prays that the said respondent be required to answer in the said matters concerning which the court is hereby informed, that it be ousted forever from the exercise of said usurped powers and functions over the said district of country hereinbefore described, and that such other and further relief may be given against the unlawful acts of said respondent as may appear to be just and proper." The affidavit of S. E. Ellsworth is as follows: "*The State of North Dakota, ex rel. George* J. *Walker et al.,* as Relators, v. *McLean County, North Dakota,* v. *McHenry County, North Dakota,* v. *Pierce County, North Dakota.* State of North Dakota, County of Grand Forks—ss.: S. E. Ellsworth, being first duly sworn, upon his oath deposes and says that he is attorney for the relators above named, and for each of them; that on or about the ——— day of June, A. D. 1901, he prepared informations in the nature of quo warranto in all respects similar to those entitled as above, and presented herewith upon this application to this court, and caused each of said informations to be duly verified by one of the said relators as aforesaid. Thereafter, on the 2d day of July, A. D. 1901, affiant presented the said information to O. D. Comstock, attorney general of North Dakota, and after fully explaining the facts leading to the preparation of said informations, and the aim and purpose of the same, requested that Mr. Comstock, as the prosecuting officer of the state, and on behalf of the state,

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apply to the district court of the proper district for writs of quo warranto directed to the respondent named in said informations, or in case he, the said attorney general, did not care to appear and act personally in the matter, then to allow such application to be made in his name as attorney general of the state. Mr. Comstock, after considering the matter, replied that, in his opinion, there were other ways of getting it than by quo warranto, and that he would have nothing to do with the matter, either by applying in person for the writs, or allowing his official signature to be used for that purpose. He gave no reason for his refusal to act, other than that above mentioned. Thereafter, on the 3d day of July, 1901, affiant appeared before Hon. John F. Cowan, judge of the district court for the Second judicial district of said state, in which district are situated the counties of Pierce and McHenry, two of the respondents named, and, after presenting the informations against Pierce and McHenry counties to Judge Cowan, informed him of the refusal of the attorney general to act, and asked that he, the said judge, grant leave to file the said informations in the district court at the instance of the relators named, and issue writs of quo warranto directed to each of the said respondents as aforesaid. Judge Cowan stated that he would take a short time to consider the application, and requested that affiant leave the information in his hands for that purpose. Affiant did so, and from that time to the present no action whatever in the matter has been taken by Judge Cowan. About August 1, 1901, affiant wrote to Judge Cowan, calling his attention to the fact that there was no response to his application in the said cases, and urging the importance to relators of some speedy hearing in the matter, and the great inconvenience resulting to them from delay. Affiant's letter bore on the outside of the envelope his name and address, and has not been returned to him; neither has he received any reply from Judge Cowan, nor any communication whatever explaining the delay or the neglect on his part to take action in regard to affiant's application as aforesaid. Affiant further says: That the said county of Church, referred to in said informations, has now, as he is informed and believes, a population largely in excess of one thousand, and has within its limits more than one hundred fifty legal voters of this state. Within the past two years the county has increased greatly in population, settlement is rapidly progressing in all parts, and large and important interests of different kinds are developing. That a proper and just determination of the questions presented by said application will become more difficult with the further advance of population and development of the material resources of the state and county, and that delay in the determination of its political status will affect injuriously the interests of said county. Affiant further says that McLean county, one of the respondents, is in the Sixth judicial district, and the other two, Pierce and McHenry counties, are in the Second judicial district; that he is informed and believes public sentiment

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and feeling in all three of the counties named is strongly opposed to any relinquishment of their claim to jurisdiction over part of Church county; that speedy and adequate relief against the claims and illegal acts of said respondents cannot be obtained in the district courts of either district, or in any other tribunal of this state, except in the supreme court." At the time these papers were presented to this court, other and altogether similar papers were presented by the same counsel, whereby leave was asked to file informations, respectively, against the counties of Pierce and McHenry. The several informations are substantially the same, and hence all the applications will be considered together, and disposed of by a single order.

Briefs in support of the application have been submitted by counsel for the relator, and the attorney general has presented a brief in opposition thereto.

With reference to a preliminary matter of practice, we deem it proper to notice that the relator has not, by this proceeding, asked this court to issue the writ of quo warranto, but, on the contrary, has applied to the court for leave to file an information in the nature of quo warranto. In this, counsel have pursued the proper course. It is true that the state constitution, by section 87, expressly confers upon this court the power to issue the writ of quo warranto; and it nowhere authorizes this court, in terms, to proceed by information in the nature of quo warranto. Nevertheless, under the established construction of similar provisions in the constitutions of other states, it is held that the power to issue the writ embraces the authority to proceed by information, and the latter course is now almost universally pursued in all courts of this country. All the remedies which anciently could be had by the writ are now attainable by information in the nature of quo warranto, or in some states, as in this, by means of a civil action. As to the practice, see *State* v. *Elliott* (Utah) 44 Pac. 248; High, Extr. Rem. § 591; *State* v. *West Wisconsin Ry. Co.*, 34 Wis. 197; *People* v. *City of Oakland* (Cal.) 28 Pac. 807; Rev. Codes 1899, c. 24 (Code Civ. Proc.). In the case at bar, counsel for the relators have, we think, properly assumed that the remedy by quo warranto may, in some form, be invoked in cases such as this, where it is alleged that a municipal corporation has been guilty of usurping political franchises by extending its governmental authority beyond and outside of its lawful boundaries. As to applying the remedy to such cases, as against the offending corporation, there is a conflict of judicial opinion; but, in our judgment, the weight of authority supports this practice. See *State* v. *Board of Com'rs* (Minn.) 69 N. W. Rep. 925, 35 L. R. A. 745; *People* v. *City of Oakland* (Cal.) 28 Pac. Rep. 807; *People* v. *City of Peoria* (Ill.) 46 N. E. Rep. 1075; *State* v. *City of Cincinnati*, 20 Ohio St. 18. We shall therefore concede the general proposition that quo warranto will lie to correct such alleged abuses and usurpations of corporate power as are here complained of, and hence the question

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is presented whether, upon the showing made by the relator, he is entitled to the benefit of the remedy at the hands of this court. This question is by no means free from difficulty and embarrassment. To properly solve the same, it must be premised that the district courts of the state have ample and undoubted original jurisdiction in quo warranto cases. Under the constitution of the state, the district courts and the judges thereof have authority to issue writs of quo warranto, and, as we have seen, the remedy of quo warranto is also fully attainable through the more familiar medium of a civil action, which action can be instituted only in the district courts of the state. See section 103, Const.; also Rev. Codes 1899, § 5741, and *People* v. *City of Oakland, supra.* It should further be mentioned that the jurisdiction of this court is primarily appellate, and that the original jurisdiction of this court can be successfully invoked only in exceptional cases, and, when invoked, the several writs which it is authorized to issue are to be regarded as strictly prerogative writs. This construction of the constitutional powers of this court with respect to original cases has the support of an unbroken chain of decisions in this state, extending from the organization of the court to the present time. See, among other adjudications, *State* v. *Nelson Co.*, 1 N. D. 88, 45 N. W. Rep. 33, 8 L. R. A. 283; 26 Am. St. Rep. 609; *State* v. *Archibald*, 5 N. D. 359, 66 N. W. Rep. 234; *Elevator Co.* v. *White* (N. D.) 90 N. W. Rep. 12; and the recent case of *State* v. *Wilcox* (N. D.) 91 N. W. Rep. 955. From these cases it must follow in this, as in all similar applications made to this court, that a preliminary question is presented, viz., whether the suitor is seeking a remedy in the proper forum. In disposing of this question it will not meet the issue to simply declare that the power to issue the enumerated writs is expressly conferred by section 87 of the state constitution. It is only by a consideration of all the cognate provisions of the constitution that we can arrive at a true and comprehensive conception of the distribution of judicial power among the various courts of the state.

The precise question under consideration was carefully considered in *State* v. *Elliott, supra,* and we gladly avail ourselves of a portion of the opinion in that case, which meets our full approval. The court say: "It will be noticed that there are five writs of which the supreme court has original jurisdiction, and very probably many controversies will arise for which one or the other of these writs will afford a proper remedy. Hence, if we were to assume jurisdiction of every such controversy which might be brought before us, regardless of whether the state had a special interest therein, or whether it presented any special exigency, it can readily be perceived that most of our time would be consumed in hearing and determining cases which could more speedily and conveniently be heard and determined in an inferior court. This would seriously impair the usefulness of this tribunal as an appellate court, and yet its appellate power was the main object of its creation. No construction which would render such a result possible is warranted by the provisions

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of the constitution relating to the judicial department. From the general policy indicated, and the language used, it is manifest that this tribunal was intended by the framers of the constitution to be essentially a court of appeals; and therefore we will not assume jurisdiction, under the grant contained in section 4, at the relation of private parties, except in cases which present some special reason or some special or peculiar emergency, or where the interests of the state at large are shown to be such as to render it apparent that the interests of justice require its exercise. The remedy provided by the constitution, authorizing proceedings in inferior tribunals, must in all cases be followed, unless it shall be made to appear to the satisfaction of this court that there is an urgent necessity for the interposition of its power. Where, as in this case, the appellate court of the state and inferior courts of general common-law powers are vested with jurisdiction in quo warranto, the appellate court may properly refuse to assume original jurisdiction in matters where the inferior courts have ample power, and can, by entertaining the information, afford adequate relief; and the right of the appellate court to exercise its discretion in granting or withholding leave to file an information in the nature of quo warranto is not limited. Nor is the discretionary power of the court exhausted until it has permitted the information to be filed." The courts of the state of Wisconsin have had occasion to consider the same general question here involved, and have reached conclusions in entire harmony with those announced by the supreme court of Utah. See citations in the North Dakota cases upon this point, above cited. We are therefore required, in deciding the question presented, to apply the principles announced in these cases to the facts now before this court.

It appears from the moving papers that, before the application was presented to this court, the relator had prepared information "in all respects similar" to those now presented to this court, and caused each of such informations to be verified by one of the relators. Such informations were, however, framed for presentation to the district court, and it appears that counsel for the relators presented the same to the attorney general of the state, and, after explaining the nature and contents of such informations, the relators' counsel requested the attorney general to "apply to the district court of the proper district for writs of quo warranto directed to the respondents named in said informations, or in case he, the said attorney general, did not care to appear and act personally in the matter, then to allow such application to be made in his name as attorney general of the state." To this request it appears that the attorney general replied that "he would have nothing to do with the matter." Upon such refusal, counsel for the relators applied to the district court for the counties of Pierce and McHenry for the writs he was seeking; and, in doing so, counsel, at the request of the district court, left said informations in the hands of the presiding judge of that court. It further appears that the district court, by remaining silent

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in the premises, has practically refused to issue the writs or to entertain the informations as a basis for further proceedings in that court, whereupon the relator, without further attempts to obtain a hearing in the court below, has presented his application to the supreme court.

We do not wish to rule in this case, nor to intimate an opinion to the effect, that a mere refusal on the part of the district court, after a proper application, to entertain quo warranto proceedings in behalf of a private relator who sees fit to champion public interests in which he has no special interest, will alone suffice to give this court jurisdiction of such a proceeding. But in the present case it suffices to say that, in our judgment, no proper effort has been made in behalf of the relator to obtain a hearing in the district court. One of the respondents (McLean county) is not situated in the judicial district in which the relator sought a remedy. Nevertheless the relator, so far as appears, wholly failed to apply to the judge of the district court in which McLean county is situated for leave to file an information. For all that appears, the district court for McLean county would, on a proper application therefor, have acted upon the information, and thereby initiated the litigation, which in due course could have been brought to this court on appeal as a test case. Nor is this all. The application which was made to the district court appears to have been entirely irregular. The statute conferring upon suitors the privilege of seeking quo warranto remedies by means of civil actions was enacted for the purpose of denuding the remedy of its many technicalities, and thereby affording litigants a plain and adequate remedy by a familiar form of court procedure. But in the case at bar no attempt was made in behalf of the relators to institute a civil action. It does not appear that a summons or a complaint was ever framed in any of the cases, or that the attorney general was ever requested to appear in behalf of the state in any civil action to be instituted in behalf of the relators, or either of them, or that he ever refused to co-operate in bringing civil actions in the premises. Moreover, a perusal of the moving papers fails to disclose any allegations showing or tending to show that special facts exist in the present cases, calling for speedy action in the courts. The existing political status in the several counties concerned is one which has existed for a period of ten years, and nothing appears tending to show that any actual wrong or inconvenience has been suffered by individuals or by the public at large as a result of the alleged usurpations of franchises. Upon such a showing, we discover no special exigency calling for the interposition of this court at the instance of any private relator. From our standpoint, the case is one calling for unusual caution, and the exercise of great deliberation on the part of the judicial department of the state. Certainly nothing in this case calls for the hasty action which would be involved if this court should initiate proceedings by putting forth its prerogative powers in opposition to the advice of

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the attorney general. If the attorney general, upon a proper request to bring a civil action in the district court, had refused to do so, such refusal would have laid a foundation upon which the relator could have moved in the district court for leave to sue as a private relator in behalf of the state. If such a motion were made, the district court presumptively would have taken some action in the cases, which action, in due course, could have been reviewed by this court as an appellate tribunal.

Upon the considerations already stated, we are, in our judgment, justified in refusing to assume original jurisdiction in these cases. But there is another factor of prime importance, and one relating to the merits of the application, which, in our opinion, leads to the same conclusion. In these cases the remedy of quo warranto is not sought as a means of exercising superintending control of an inferior court, or in aid of the appellate jurisdiction of this court. On the contrary, the relator is before this court with the avowed purpose of invoking its original powers. In such cases, as has been repeatedly held, the enumerated writs are not writs or right, but are strictly prerogative writs, and the same will issue only in cases *publici juris*, where the sovereignty of the state, or its franchises and prerogatives, or the liberties of its people, are directly, and not remotely, involved. In this class of cases the attorney general of the state, who is a constitutional officer, and one whose duty it is to represent the state and to vindicate its authority, is the proper person to initiate the proceedings; and it is his duty, as a sworn officer, to ask leave of this court to file an information in all cases where, to protect the interests of the state, it becomes necessary to invoke the prerogative jurisdiction of this court. True, cases have arisen, and may again arise, in which this court will, for peculiar reasons, assume original jurisdiction at the instance of a private relator, but, as was said in *State* v. *Wilcox, supra,* "the cases are few and quite exceptional in which this court will, in behalf of the state, assume original jurisdiction at the instance of a private citizen." Ordinarily a private person, who volunteers as a champion of only public rights, and as such invokes the prerogative writs, will be regarded as an intermeddler. It appears by the information, and more fully by the briefs of counsel in behalf of the relator, that the relator has suffered no wrongs peculiar to himself, but, on the contrary, the relator appears in this court solely as a champion of the state, and for the ostensible purpose of protecting governmental franchises from abuse. In presenting the case of the relators, counsel have first called the court's attention to the fact that the county of Church, within which there never has been an attempt to organize as a county, is nevertheless a legally created county, in this: that it has been named and its boundaries have been defined by law. Counsel next proceed to call attention to the allegations of the informations, which are to the effect that the counties named as respondents have respectively extended their authority and jurisdiction as counties over a portion of the territory

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of the county of Church, and as a result of such combined action the entire territory of Church county has been absorbed, and, as is claimed, is unlawfully appropriated by the respondents for governmental purposes. It is conceded that the action of the respondents, the several counties, which is here complained of, was taken under color of law, and in pursuance of the express permission of a statute enacted by the state legislature and approved March 2, 1891. The act referred to is entitled "An act to increase the revenues of the state by changing and increasing the boundaries of the counties of Pierce, McHenry, Bottineau, Ward, McLean, Williams, Billings, Stark, Morton and Mercer; and by repealing the act entitled: 'An act pertaining to the subdivision of the counties of Wallette and Howard, Dakota territory,' approved March 9th, 1883." See chapter 50, Laws 1891. This statute, by its terms, undertook to change and increase the boundaries of 10 counties, and by its sweeping provisions a political status was sought to be established which would embrace a territorial area of vast extent. The record before us does not disclose what particular action was taken by the several counties named in the act, except as to the three named as respondents; but as to the other counties, the reasonable presumption is that action was taken therein pursuant to the authority conferred by the act. It appears that the respondent counties, McLean, Pierce, and McHenry, have, pursuant to the provisions of the act, proceeded to increase and change their boundaries, and in doing so have extended their jurisdiction as counties over the territory in which the relators severally reside, and in which they are taxpayers; and such action has resulted in the absorption of the entire territory embraced within the original boundaries of Church county, as such boundaries were defined by the statute which created and named that county.

Upon this showing, especially with reference to the fact that the prerogative writ sought is not a writ of right, available to a private suitor, but is, on the contrary, a writ of grace, and one to be granted or withheld by the supreme court as sound discretion may dictate, it will be proper carefully to consider the existing political conditions in the territory involved in this proceeding, and, in so doing, take account of the conditions which will be superinduced within the territory in question if the existing governmental status therein were to be overthrown as a result of these proceedings. Before assuming jurisdiction of these cases, it is, in the opinion of this court, very important to consider the consequences which will necessarily ensue if the relief asked by the relators is granted by this court; and this more especially in view of the entire want of power in this court either to rehabilitate the political machinery sought to be destroyed, or to create a new governmental status within the extensive region which would be affected if the relief asked were granted. It would be impossible, within reasonable limits, to anticipate and set out all the consequences likely to result from granting the relief sought in these cases, and, in presenting the practical aspects of the

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situation involved, we think we cannot do better than to avail ourselves of a statement made in the very able brief of the attorney general, from which we quote the following passage: "It appears upon this record that the defendants * * * have exercised governmental functions and franchises over the people of the said territory since 1892. This means: That four general elections have been conducted in that time. Revenue by taxation has been raised. Improvements have been made. Civil township, school district, and county officers have been elected, and have exercised the usual functions. That the state has accepted and received its share of taxes levied and collected. School and county indebtedness have been funded. Large amounts of delinquent taxes are unpaid. The state government, by its officers, has recognized the present conditions, and continually acquiesced in them. Members of the state legislature have been elected, and laws made affecting this territory. This territory has been acting in all respects under the general laws of the state, as parts of the counties from which they now seek to segregate them. The congressional apportionment was made by the last state legislature, for the next ten years, with these counties as now organized taking part therein. Three senatorial elections have occurred under existing conditions, with these counties taking part. There has been continued acquiescence by the state and all the people in all these acts, and the counties, as now organized, have participated therein without any objection from any source whatever. * * * These counties have been acting for ten years under the general laws of the state, recognized by the courts to be constitutional and valid. The operation of the laws there is as uniform, satisfactory, and wholesome as in any county in the state. No complaints have come from the people, showing that the present organization of these counties works any hardship or oppression upon a single individual, or that property interests and personal rights are not amply protected and safeguarded. In fact, a peaceful, contented, and prosperous condition exists. No calamity is anticipated, and no hardship or damages threaten the relators or any other person, on account of the present boundaries of these counties. The relators do not show one reason for bringing this action, other than the technical one that the law fixing the present boundaries was unconstitutional; and they do not claim any benefit will be derived from the proposed change, except that the question as to the boundaries will be judicially determined."

But regardless of consequences, serious of otherwise, the relators insist that the counties of Pierce, McLean, and McHenry should, by the judgment of this court, be compelled to withdraw from the territory over which they have exercised political franchises as counties for the period of ten years. This drastic remedy is claimed by the relators chiefly upon the ground that said act of 1891 is an unconstitutional enactment, within the rule laid down by this court in the case of *Richard* v. *Stark Co.*, 8 N. D. 392, 79 N. W. Rep. 863, in which this court held that an act embraced in chapter 25 of the

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Laws of 1895 is unconstitutional, because by its title it violated the provisions of section 61 of the state constitution. But it should be stated that the action of *Richard* v. *Stark Co.* was instituted within less than three years after the passage of the act of 1895, and that the same was a civil action commenced in the district court, and presumably with the consent of that court. The case reached this court regularly on appeal, and in this court, unlike the case at bar, the attorney general made no objections and urged no reasons against granting the relief demanded in the complaint. But in disposing of the cases under consideration, we shall assume that chapter 50 of the Laws of 1891 is unconstitutional for the reason stated in the Stark Co. Case, and this conclusion will serve to present the crucial point to be decided, viz., whether, under the political conditions presented in the information in the cases at bar, it would be a proper exercise of the discretion lodged in this court in this class of cases to grant the relief, and thereby precipitate the governmental chaos which would immediately and certainly result from such action. We have no doubt whatever that the remedy sought should be denied. If we were exercising the powers of a district court, we should certainly hesitate long before granting leave to any private relator to institute a civil action for the relief sought by these relators, especially if the attorney general of the state should oppose such application. For much stronger reasons, which need not be repeated, this court is in duty bound to deny the relief sought by a private relator, who, against the advice of the law officer of the state, demands that this court should put forth its prerogative authority upon the theory that the interests of the state at large demand that it should do so. In this class of cases the doctrine of estoppel has been successfully invoked as against a private relator, and even the state itself may be estopped by long acquiescence in and frequent recognition of corporate powers, which have been assumed without lawful authority. This sound and practical rule has the support of abundant authority, and the later cases are quite as emphatic as any upon this point. See *State* v. *City of Des Moines* (Iowa) 65 N. W. Rep. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381; *People* v. *Alturas Co.* (Idaho) 44 L. R. A. 122; *People* v. *Maynard*, 15 Mich. 463; *Jameson* v. *People*, 16 Ill. 257, 63 Am. Dec. 304; *State* v. *Leatherman*, 38 Ark. 81; *Rumsey* v. *People*, 19 N. Y. 41; High, Extr. Rem. § 686. These authorities are, in our judgment, strictly in point as against the contention of the relators' counsel. We shall not, however, discuss them in detail. The recent case of *State* v. *City of Des Moines, supra,* is a compend of authority upon the question, and goes to the full extent of holding that where a city, acting under color of an unconstitutional statute, had extended its corporate powers over adjoining territory, and, for a period of four years only, had continued to exercise corporate franchises within such territory, the court would, in the exercise of its discretion, refuse to interfere by quo warranto, and thereby disrupt political conditions existing within

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the territory concerned. After holding that the law under color of which the city had extended its boundaries was unconstitutional and void, the court concluded its opinion in language which applies with equal, if not greater, force to the facts of the cases under consideration: "Finally, it may be said that, aside from the necessity of maintaining the integrity of the constitution against infractions from legislative action, there is not a reason suggested for, or a benefit anticipated from, the judgment sought in this proceeding. Such a judgment would disrupt the present peaceful and satisfactory arrangement of all the people of the city, as to its corporate existence, without a benefit, so far as we know, to any person. The law does not demand such a sacrifice for merely technical reasons. In fact, the constitutional vindication is complete with the declaration that the act is absolutely void. The judgment of the district court is affirmed."

In the light of authority, we are justified in saying that it would, in our opinion, be an unsound exercise of judicial discretion to grant the relief sought by these proceedings, even if the applications were backed by the request of the attorney general of the state; and to grant the relief at the request of a private person, would, we think, involve a gross abuse of the powers of this court. The rule of the authorities is expressed in High, Extr. Rem. § 605, as follows: "And the principle is now firmly established that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made." The authorities cited below fully sustain the rule above quoted. "The most important, if not the only, interest to be served, is that of the public. If that is kept constantly in view, but little difficulty should be encountered. * * * The remedy is by no means a matter of absolute right on the part of the relator." See Spell. Extr. Relief, § 1777; *People* v. *Waite*, 70 Ill. 25; *People* v. *Moore*, 73 Ill. 132; *People* v. *Keeling*, 4 Colo. 129; *State* v. *Fisher*, 28 Vt. 714; *State* v. *Smith*, 48 Vt. 266; *Com.* v. *Cluley*, 56 Pa. 270, 94 Am. Dec. 75.

We are clear that the relief sought should not be granted, and this court will enter an order denying leave to file the informations. All the judges concurring.

(92 N. W. Rep. 385.)

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CITY OF FARGO *vs.* D. C. ROSS, *County Treasurer.*

Statute—Amendment.

When a particular section of a statute is amended by retaining some of the provisions of the original section without change, and complete in themselves, and omitting other provisions which in no way affect the parts retained, and there is no express repeal of the original section, the provisions of the original section which are retained will not be deemed to have been repealed and re-enacted, but to have been continued in force from their first enactment, with such modifications as have been made by subsequent acts; and the omitted portions only will be deemed to be abrogated and repealed by the amendment.

Statute—Repeal—County Treasurers.

Construing chapter 149, Laws 1901, which in terms amends section 2496, Rev. Codes 1899, which section was enacted as a part of chapter 102, Laws 1897, and in part provides for the payment by county treasurers of penalties and interest collected on city taxes to city treasurers and in part to the county treasurers' commissions upon such collections, it is *held* that the amendatory act only repeals that part of said section which authorizes county treasurers to retain a commission, and that the remaining portions of said section were in no way affected by the amendment.

Payment of Penalties.

Held, further, that said amendatory act did not, by implication, repeal section 1260, Rev. Codes 1899, which was enacted in chapter 4, Laws 1899, and modifies section 2496, and provides that all interest and penalties, except on special assessments, shall belong to the counties collecting them.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the city of Fargo against D. C. Ross, as treasurer of Cass county. Judgment for plaintiff, and defendant appeals. Reversed.

Newton & Smith and *George W. Newton*, for appellant.

M. A. Hildreth, for respondent.

YOUNG, J. On the 4th day of February, 1902, an alternative writ of mandamus was issued by the district court of Cass county, directed to the defendant, the treasurer of said county, and commanding him to pay over to the city treasurer of the city of Fargo all interest and penalties collected on city taxes since July 1, 1901, or to show cause why he had not done so. The writ was based upon an affidavit of H. F. Miller, the city attorney of said city, in which it is alleged that there is a large sum of money in the hands of the defendant, belonging to the city of Fargo, which the defendant neglects and refuses to account for or turn over to C. H. Mitchell, the treasurer of said city, and the legal and proper person to whom

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such money should be paid under the law; that said city, through its said treasurer, C. H. Mitchell, has demanded of the defendant the payment to him, as such treasurer, of all interest and penalty collected on city taxes after the 1st day of July, 1901, "and that he made such demand in pursuance of and in conformity to section 2496 of the Revised Codes of this state, as amended at the last session of the legislature, which said amendment was approved March 7, 1901"; that in reply to said demand the defendant refused to account for or turn over to the said C. H. Mitchell the penalty and interest collected on city taxes since July 1, 1901. The demand of the city treasurer and refusal of the county treasurer are in writing, and are attached to the affidavit. The demand of the city is for "all interest and penalty collected on city taxes since the 1st day of July, 1901," and the written demand stated that it is made under section 2496, Rev. Codes, as amended in 1901. The county treasurer, acting on the advice of the county attorney, refused to comply with such demand, and in writing declined "to turn over any money collected from any interest and penalty accrued on taxes other than penalties on specials which has been turned over to the city at each monthly settlement." Upon the return day, the defendant interposed a demurrer upon the ground that the facts set forth did not constitute a cause of action, or show that the defendant is entitled to the relief asked, or any other relief. The demurrer was overruled by the trial court, and judgment entered directing the issuance of a peremptory writ of mandamus requiring the defendant to turn over to the city treasurer all the interest and penalty collected on city taxes since the 1st day of July, 1901. The defendant filed an undertaking to stay execution of the judgment, and appealed from the judgment.

The question presented is whether the city or the county is entitled to the interest and penalties collected upon city taxes since July 1, 1901, and it is agreed that this question turns entirely upon the effect to be given to the amendatory act (chapter 149, Laws 1901), which went into effect on July 1, 1901. If that act operated to repeal sections 2496 and 1260, Rev. Codes 1899, it is agreed that the interest and penalty belongs to the city; otherwise not. Section 2496 was enacted as a part of chapter 102, Laws 1897, and reads as follows: "The county treasurer of such county shall thereupon collect such taxes, together with the interest and penalty thereon, if any, in the same manner as the general taxes for that year, and shall pay over to the city treasurer of such city all sums so collected as fast as collected, and shall take the city treasurer's voucher therefor; *and the county treasurer shall retain from the moneys collected for each city, as a fee to be turned over to the county, one per cent. of the amount so collected.*" Section 1260 was enacted as chapter 4, Laws 1899, and is as follows: "All penalty and interest collected on taxes shall belong to the county and become a part of the general fund, or such other fund as the county commissioners may direct;

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except the penalty and interest collected on special assessments due to cities, and all such penalties and interest shall be paid to the city thereunto entitled." In 1901, section 2496, *supra,* was amended by chapter 149, Laws 1901, which is entitled "An act to amend section 2496 of the Revised Codes of 1899, relating to the duty of county treasurer in the collection of city taxes," and reads as follows: "Section 1. That section 2496, of the Revised Codes of 1899, be amended to read as follows: Section 2496. The county treasurer of such county shall thereupon collect such taxes, together with the interest and penalty thereon, if any, in the same manner as the general taxes for that year, and shall pay over to the city treasurer of such city all sums so collected, as fast as collected, and shall take the city treasurer's vouchers therefor." It will be seen that section 2496, first above quoted, as it originally stood, and prior to its modification by section 1260, *supra,* required that all sums collected by county treasurers, including interest and penalties, should be turned over to the city, except the 1 per cent. commission of the county treasurer. It will also be noted that section 2496 was modified by Laws 1899, c. 4, § 1260, *supra,* which latter section gave the interest and penalties on all taxes to the county, except on special assessments, and provided that interest and penalty on special assessments was to be turned over to the city. This was the condition of the law when the amendatory act (chapter 149, Laws 1901) took effect upon the 1st day of July, 1901; in other words, counties were entitled to interest and penalties, except upon special assessments.

It is conceded that this case turns upon the effect to be given to this amendatory statute, and that, independent of it, the city had no claim against the county. It is the county's contention that the amendatory act had no further or other effect than to repeal and abrogate that part of section 2496, *supra,* relating to the county treasurer's commission, which was omitted in the amendatory act; which omitted part, for convenience of reference, we have italicized. The respondent's counsel contend, on the other hand, that section 2496 was wholly repealed by the amendatory act, and that section 1260 was repealed by implication to the extent that it conflicts with section 2496, as amended. As an indisputable conclusion from these assumptions, counsel for the city contends that the right of the city to interest and penalties is to be measured by the amendatory act entirely, and without regard to any other or pre-existing provisions, and that in this view the city is entitled not only to the interest and penalties upon special assessments, but also to interest and penalties upon all city taxes. The trial court agreed with this contention, and, in effect, held that both sections 2496 and 1260, *supra,* were repealed by the amendatory act (chapter 149, Laws 1901), and that the right of the city is governed by the last-named act. We are unable to agree with this conclusion, and for reasons which to us appear entirely convincing. In the first place, chapter 149, Laws 1901, con-

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tained no express repeal, either of section 1260 or section 2496. On the contrary, section 2496 was merely amended by it, and it was amended not by introducing any new provisions, or provisions repugnant to the provisions of said section or to section 1260. The section, as amended, merely omits the provision relating to the county treasurer's commission. As to the other portions of the original section, no change whatever was made, even to the extent of a word or syllable. The legal effect of the amendatory act, in our opinion, was merely to repeal or abrogate the part omitted. The other parts of the section were left intact, and, under well-settled rules of statutory construction, they continued in full force, and with the same legal effect, as though no amendment had been made. The fact that those portions were republished at length in obedience to the constitutional provision requiring such publication when an amendment of an existing statute is to be effected is not important in determining whether such portions were repealed, and again enacted by the amendatory act. The result of an amendment effected under this constitutional provision is not, in legal effect, different from that which could have been accomplished before the provision existed, by merely striking out the portion desired to be omitted. If, in this case, that course had been pursued, and the provision relating to the county treasurer's commission had been stricken out,—as it might have been under the old system of amending,—no one, we think, would contend that the other portions of the section, which relate to interest and penalties, had been affected in any way whatever. The decision of all courts of last resort to which our attention has been called are in harmony with the views above expressed. In *Ely* v. *Holton*, 15 N. Y. 595, the court said: "The form in which amendments, both of the Code and of the Revised Statutes, have generally been made, by declaring that particular sections shall be amended so as to read in a given way, was adopted for the purpose of adjusting them to the original enactments, so that when the system should, after repeated amendments, become complete, the different parts might be put together without further revision, and thus form a perfect code. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. * * * The portions of the section which are repealed are to be considered as having been the law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amended act took effect." Later the same court, in *Moore* v. *Mausert*, 49 N. Y. 332, said: "In *Ely* v. *Holton*, 15 N. Y. 595, it was decided by this court that the effect of an amendment of a statute made by a subsequent statute declaring that such statute shall be amended so as to read as follows, retaining a part of the statute amended, and incorporating therein new provisions, was not

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to repeal the part retained, and re-enact the same, but that such part of the statute continued in force from the first enactment, and that the new provisions incorporated became operative from the time the amendatory statute took effect. It would follow that, where certain provisions of the original statute were omitted from the amendatory statute, such provisions were abrogated, and ceased to form any part of the statute, after such time." In *People* v. *Board of City Assessors of Brooklyn,* 84 N. Y. 610, it was held that the effect of an amendment such as we are considering was to repeal the portion of the act omitted from the act as amended. The views of the supreme court of New York, as above expressed in *Ely* v. *Holton,* were quoted and approved in *Railroad Co.* v. *Shakelford,* 63 Cal. 261. In *State* v. *Herzog,* 25 Minn. 490, the court, in considering the effect of an act amending a certain section of a statute which retained certain portions of the original section, said that, as to the parts retained, "the original section is not repealed, abrogated, changed, or amended, but simply preserved and continued; for there never has been a moment of time since its adoption when the rule of law announced by it did not exist." In *Gordon* v. *People,* 44 Mich. 485, 7 N. W. Rep. 69, the court, in considering the effect of amendments effected under a constitutional provision like our own, said: "The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed, it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the merely nominal re-enactment would have the effect of disturbing the whole body of statutes in *pari materia* which had been passed since its first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be recognized. Repeals by implication should not be established without satisfactory reason to believe such was the legislative will." The same principle is also applicable to repeals. In *Lumber Co.* v. *Lee,* 7 N. D. 135, 73 N. W. Rep. 430, BARTHOLOMEW, J., speaking for the court, said: "It is a well-settled principle of law that where a statute is repealed, and the repealing statute, which goes into effect the moment the former is repealed, contains provisions identical, or practically identical, with those in the statute which is repealed, such provisions are not to be regarded as repealed, but rather as continuing in force without intermission. *Steamship Co.* v. *Joliffe,* 2 Wall. 450, 17 L. Ed. 805; *Wright* v. *Oakley,* 5 Metc. (Mass.) 406." See, also, *Com.* v. *Herrick,* 6 Cush. 465; Suth. St. Const., § 133; and End. Interp. St. §§ 195, 196, and cases cited, to the same effect. Section 1260, which admittedly was the governing statute when the amendatory act took effect, is not referred to by it in any way, and the amendatory act only purports to amend section 2496, and as to that section the entire scope of the amendment is confined to the matter of the county treasurer's commission.

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This is apparently all the change the legislature desired to make. That part was abrogated. The other portions remained untouched and unaffected by the fact that they were republished. The amendment, therefore, gave to the portions retained no force or effect further than existed prior to the amendment. The operation of that section had been modified by the subsequent passage of section 1260, which latter section gave the interest and penalties on city taxes to counties; and the amendment of 1901, not being a repeal and reenactment of section 2496, the city can claim no new or further right to interest and penalties than it had prior to the amendatory act.

The judgment of the district court is reversed. All concur.

(92 N. W. Rep. 449.)

AGNES E. GARLAND *vs.* FOSTER COUNTY STATE BANK.

Quieting Title.

It is *held*, upon a review of the entire case in this court, in an action to quiet title to real estate, that the finding of the trial court that the plaintiff is the owner of the land in controversy is fully sustained by the evidence.

Lost Deed.

One who relies upon a lost deed to sustain his title to real estate must establish its original existence, its loss, and the material parts thereof, by clear and convincing evidence.

Appeal from District Court, Foster County; *Pollock*, J.

Action by Agnes E. Garland against the Foster County State Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

F. Baldwin, for appellant.

Smith Stimmel, for respondent.

YOUNG, J. The plaintiff brought this action to quiet title to certain real estate, consisting of 160 acres, situated in Foster county, alleging ownership of the same, and to recover the possession of said real estate, and the value of its use and occupation for the time it was withheld by the defendant. The answer denies that plaintiff is the owner or entitled to the possession of said land, and alleges that the ownership and right of possession are in the defendant. The trial court found that the plaintiff is the owner of the land, and entitled to the possession thereof, and to the sum of $280.36, as the value of its use and occupation, and directed the entry of judgment accordingly. From the judgment so entered, defendant has appealed to this court for a review of the entire case.

It is conceded that there is but one question for review, and that is a question of fact. The plaintiff is the original patentee, having

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obtained a patent from the United States in 1889. Her claim is that she has never conveyed the land, but still retains the title which she acquired under her patent. The defendant claims that plaintiff executed and delivered a deed of the land to her father, Malcolm Nicholson. It was through a conveyance executed by Malcolm Nicholson that the defendant acquired the title upon which it relies. It is agreed that defendant's title is good and valid if Malcolm Nicholson had title; and it is further agreed that, if Malcolm Nicholson did not have title, the plaintiff's title is unassailable, and the judgment of the trial court is in all respects proper. It will thus be seen that the entire case turns upon the question as to whether the plaintiff conveyed the land to Malcolm Nicholson. The trial court found that she did not. We have no hesitation in reaching the conclusion that this finding of the trial court must be sustained. No such deed was produced and offered in evidence, and it is shown that no deed of conveyance executed by the plaintiff has ever been placed of record in Foster county. The only evidence offered by defendant tending to show the existence of the alleged deed of conveyance is contained in the testimony of two witnesses, who say that they think they saw a deed from the plaintiff to her father among certain papers which were in the possession of one S. W. Nicholson, who is plaintiff's brother, upon an occasion when the latter was in the register of deed's office, examining the record title of this and other lands. Neither of these witnesses was acquainted with the plaintiff's signature, and neither attempted to swear that the paper they saw was signed by plaintiff. Neither did they undertake to state its contents. Both of them state that they think the paper contained an acknowledgment, but neither was able to give the name of the notary. The S. W. Nicholson referred to by them was a witness, and testified in this case unequivocally that he had no such deed in his possession. Both the plaintiff and her father testified explicitly that no deed was executed and delivered by the plaintiff, and their testimony is unshaken by any evidence or facts in the case. It is entirely apparent that this evidence utterly fails to establish the existence and delivery of a deed by the plaintiff to her father. Strict proof of that fact was necessary, to sustain the defendant's alleged title. The rule is well settled that one who relies upon a lost deed to sustain his title to real estate must establish its original existence, its loss, and the material parts thereof, by clear and convincing evidence. *Land Co.* v. *Denny* (Ala.) 18 South. Rep. 561; *Loftin* v. *Loftin* (N. C.) 1 S. E. Rep. 837; *Fries* v. *Griffin* (Fla.) 17 South Rep. 66.

The evidence in this case is not of that character, and the judgment of the district court must therefore be affirmed, and it is so ordered. All concur.

(92 N. W. Rep. 452.)

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J. R. BRANDRUP *vs.* RILEY T. BRITTEN.

Contract to Sell Realty—Authority of Agent.

In this state, under the provisions of sections 3887, 3960, Rev. Codes, it is essential to the validity of a written contract for the sale of real property, which is signed by an agent of the vendor, that the authority of such agent to execute it shall be in a writing subscribed by the principal.

Agent's Power to Sign.

The ordinary authority of a real estate broker with whom lands are listed for sale does not extend to signing a contract of sale, and this is true whether the authority of the broker is conferred by writing or by parol. The authority to execute a contract of sale is an additional authority. It follows, therefore, that when a real estate owner executes and delivers a written authority for the sale of real estate to real estate brokers, and the instrument confers no further or additional authority than is common to such brokers, they have no authority to sign contracts for the owner. It is *held* that the written instrument set out in the opinion conferred upon the defendant's agents only the ordinary authority of real estate brokers, and did not authorize them to sign the defendant's name to the contract of sale which is sought to be enforced in this action.

Appeal from District Court, Richland County; *Lauder,* J.

Action by J. R. Brandrup against Riley T. Britten. Judgment for defendant, and plaintiff appeals. Affirmed.

George W. Freerks and *A. J. Bessie,* for appellant.

Morphy & Propper, for respondent.

YOUNG, J. The plaintiff in this action seeks to compel the defendant to specifically perform a certain written contract alleged to have been executed by the defendant, and by the terms of which defendant agreed to sell and convey to the plaintiff certain real estate, consisting of 640 acres, situate in Richland county. The trial court found that the contract in question was not executed by the defendant, or by his authority, and directed the entry of judgment dismissing the action. Plaintiff has appealed from the judgment, and demands a review of the entire case in this court.

The facts which are material to a determination of the questions involved are as follows: On November 6, 1901, the plaintiff, who was then, and now is, the owner of the real estate in question, listed the same for sale with Meis & Orcutt, real estate agents doing business in the city of Wahpeton. The listing contract was in writing. Omitting the description of the property, it is as follows: "I hereby grant to H. B. Meis and Orcutt the sale of the following described property for six months at the price and upon the terms below mentioned, with the express understanding that the said H. B. Meis shall use all diligence and make active and strong efforts to sell said property. * * * Price, net to me, $9,000, not less than

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$3,000 cash, and assume mortgage now on land. R. T. Britten." Prior to the expiration of their authority to sell, said firm found a purchased in the person of J. R. Brandrup, the plaintiff in this action; and on Sunday, April 20, 1902, H. B. Meis, a member of said firm, accompanied him to the residence of the defendant, on said land, and introduced him as a prospective purchaser. He also informed defendant that he was at liberty to negotiate with the plaintiff directly, stating that the commission of his firm would be paid by the plaintiff. As a result of the negotiations then had, an oral agreement was reached between the plaintiff and defendant for the purchase and sale of the real estate in question, which oral agreement embraced a number of details and conditions which were not provided for in the listing contract hereinbefore set out. The sum of $10 was paid to the plaintiff as earnest money. It was also agreed that the defendant would go to Wahpeton within a few days thereafter, and complete the transaction. The defendant went to Wahpeton on the following Wednesday, but he then declined and refused to carry out the oral agreement entered into on the Sunday previous, and still refuses to do so. The $10 received as earnest money was tendered to Meis & Orcutt, and, upon their refusal to receive the same, was deposited by the defendant in a bank at Wahpeton to the credit of the plaintiff, and a notice served, stating the fact of such deposit. The defendant at the same time served notice upon Meis & Orcutt, and also upon certain other real estate agents with whom he had listed his property, withdrawing it from market. Before the service of such notice of withdrawal, however, and on the Monday previous, Meis & Orcutt had accepted a further payment of $100 from the plaintiff on the purchase price of the land, and, assuming that they had authority to bind the defendant, joined the plaintiff in the execution of the following instrument, which is the contract sought to be enforced: "Wahpeton, N. D., April 21st, 1902. Contract and agreement made and entered into by and between R. T. Britten, of N. D., party of the first part, and J. R. Brandrup, of Mankato, Minnesota, party of the second part, witnesseth: That in consideration of $110, in hand paid by party of the second part, the party of the first part has this day sold to the party of the second part the following described land, viz: The S. E. ¼ section 31, the S. ½ of section 32, and the S. W. ¼ of section 33, in township 129 north, of range 48 west, for $9,000.00, to be paid as follows: $2,890 cash; balance over present incumbrance to be paid as follows: in six annual payments, at the rate of six per cent. interest. The party of the second part has the privilege of paying all or any part of said sum or sums at any time. The party of the second part is to have one-half of all crops grown on said land during the year 1902, including hay, and is to pay one-half of the machine threshing bill, and to pay for half of the twine used in harvesting said crop. R. T. Britten, by F. Orcutt and H. B. Meis, Agents. J. R. Brandrup. Witness: F. Orcutt. H. B. Meis."

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Is this defendant's contract? It will be seen that it was not signed by him in person. The question, then, is whether Meis & Orcutt had authority to sign it for him. Counsel for plaintiff contend that they had such authority under the written agency contract hereinbefore set out. Counsel for respondent, on the other hand, contend: (1) That said contract of agency only conferred upon Meis & Orcutt the authority ordinarily possessed by real estate brokers, and that it did not empower them to make a written contract which would bind their principal; (2) that, even if it did confer authority to execute a contract binding upon their principal, the contract in question was beyond the authority given, for the reason that it embraced a number of provisions which were not set out in the listing contract; and further, (3) that their agency was relinquished and terminated by the acts of the agents themeselves prior to the execution of the contract in question, namely, on the previous Sunday, when they brought the plaintiff and defendant together for the purpose of concluding the negotiations. We shall have occasion to consider only the first of these contentions. The trial court held, as a matter of law, "that the said firm of Meis & Orcutt had no authority to sign the said contract dated April 21, 1902, and the said defendant is not bound thereby." This conclusion is, we think, entirely sound, and must be sustained. In this state it is essential to the validity of a written contract for the sale of real property signed by an agent that the authority of the agent to sign the same shall be embodied in a writing subscribed by his principal. Section 3887, Rev. Codes, declares that certain agreements which are therein enumerated are invalid unless in writing, signed by the party to be charged or his agent. Among these are agreements "for the sale of real property or of an interest therein," and said section further provides that "such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged." Substantially the same requirements are repeated in section 3960, Id., which provides that "no agreement for the sale of real property or of an interest therein, is valid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or his agent thereunto authorized in writing." It is not contended that Meis & Orcutt had any further authority to sign the defendant's name to the contract in question than was given by the listing contract hereinbefore set out. Does this writing confer such authority? We are clear that it does not. It will be seen upon inspection that it contains no language which, in terms or by fair inference, authorizes the real estate brokers therein named to execute contracts or conveyances on behalf of their principal. It is patent that it confers upon them no further or greater authority than is commonly given to real estate brokers with whom land is listed for sale. And it is well settled that the agency of such persons is limited to finding purchasers who are acceptable

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to vendors, or who are prepared to comply with the conditions of sale proposed by the vendors to their brokers, and, in the absence of express authority, does not extend to signing contracts of sale or conveyances on behalf of their principal. That was the conclusion reached by this court, after a careful review of the authorities, in the case of *Ballou* v. *Bergsvendsen,* 9 N. D. 285, 83 N. W. Rep. 10, in which this question was directly involved. We quote the following from the opinion in that case: "It is well settled that their authority does not extend to binding their principals by contracts of sale, but merely to procuring purchasers for the property listed with them, who will be acceptable to the owners. *Coleman* v. *Garrigues,* 18 Barb. 60; *Glentworth* v. *Luther,* 21 Barb. 145; *Morris* v. *Ruddy,* 20 N. J. Eq. 236; *Duffy* v. *Hobson,* 40 Cal. 240, 6 Am. Rep. 617; *Armstrong* v. *Lowe,* 76 Cal. 616, 18 Pac. Rep. 758; *Siebold* v. *Davis,* 67 Iowa 560, 25 N. W. Rep. 778; *Stewart* v. *Pickering,* 73 Iowa 652, 35 N. W. Rep. 690. In *Halsey* v. *Monteiro* (Va.) 24 S. E. Rep. 258, the court said: 'A real estate broker or agent is defined to be one who negotiates the sale of real property. His business generally is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind his principal by signing a contract of sale. A sale of real estate involves many things besides fixing the price. The delivery of the possession has to be settled; generally, the title to be examined; and the conveyance, with its covenants, to be agreed upon and executed by the owner,—all of which require conference and time for their completion. They are for the determination of the owner, and do not pertain to the duties, and are not within the authority, of a real estate agent. For obvious reasons, therefore, the law wisely withholds from him any implied authority to sign a contract of sale on behalf of his principal.' See, also, *Holmes* v. *Redhead* (Iowa) 73 N. W. Rep. 878; *Everman* v. *Herndon* (Miss.) 15 South. Rep. 135." A real estate broker may be given authority to execute contracts for his principal, but it is an additional authority. The instrument under consideration does not confer any such additional authority. It merely "grants" to the real estate brokers "the sale" or the selling of the land for a limited period, and, for the guidance of such brokers, it states the total net sum which the principal will accept, and the amount of cash payment which he will exact in case of a sale. As will be seen by an examination of the instrument, the details essential to the consummation of a sale are omitted. It does not provide the length of time the deferred payments are to run, or how they are to be divided, or as to the rate of interest to be charged, or as to whether a deed is to be given to the purchaser, and a mortgage to secure the deferred payments, or as to whether any deed shall be executed prior to full payment of the purchase price. These omissions tend strongly to show that it was the intention of the parties to the instrument that the sale was to be approved, and the contract of sale executed, by the principal,

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and not by the brokers. And such, as we have seen, was the construction placed upon it by the plaintiff and the brokers in conducting the negotiations with the defendant on the Sunday preceding the execution of the contract. The fact that the writing grants "the sale" of the premises to Meis & Orcutt does not mean that they had authority to sign contracts of sale. It has been held in numerous cases, where express authority was given to real estate brokers "to sell" real estate, that the language did not authorize them to execute contracts or conveyances. Such was the holding in *Duffy* v. *Hobson*, 40 Cal. 240, 6 Am. Rep. 617, in which one Atkins, who had authority to sell his principal's real estate, had signed a contract of sale to one Duffy in behalf of Hobson, his principal. In that case the court said: "We are of opinion that the authority given to Atkins to sell the property was not sufficient to authorize him to execute a contract of sale to Duffy in the name of Hobson, or to sign the name of the latter to any contract of sale. We think that it was no more than a mere authority from Hobson to find him a purchaser at the price of $2,000. This is the settled construction put upon the employment of professional brokers 'to sell' or 'to close a bargain' concerning real estate, and we know of no reason why the same language employed to express the authority of any other agent 'to sell' should have a more extended meaning. Besides, a sale of real estate involves the adjustment of many matters in addition to fixing the price at which the property is to be sold. The deed of conveyance may be one with full covenants of seisin and warranty, or only those covenants imported by the use of the words, 'grant, bargain, and sell' under our statute, or it may be quit-claim merely. The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract, even if the title prove satisfactory; and he may decline to bind himself to convey to such a purchaser at the end of the time necessary to examine the title, because he might thereby in the meantime lose an opportunity to sell to some other person who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence. All these and many other like considerations might, and usually do, arise in the mind of the vendor. Now, a mere authority 'to sell' can hardly confer power upon the agent to determine all these matters for his principal, so as to bind him by his determination. And yet, unless the agent do have such power, he cannot make a definite contract, or one that could be said to have the certainty requisite to deprive the principal of his option to ultimately decline to make the sale. To give to the mere words 'to sell' such a broad signification as that would be to invest the agent with powers of that ample and discretionary character usually only conferred with caution, and by means of a general letter of attorney, where the terms are distinctly expressed." In *Armstrong* v. *Lowe*, 76 Cal. 616, 18 Pac. Rep. 758, Cook & Henderson, real estate brokers, had signed a contract of

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sale for their principal, pursuant to the following written authority: "Cook & Henderson, real estate agents: You are hereby authorized to sell my property, and receive deposit on same, situated in * * * county of San Luis Obispo, * * * for $200 per acre, cash." The court said: "The sole question in this case is whether the real estate broker whom the defendant employed 'to sell' certain real property had authority to execute a contract to convey. We think that, upon the authority of *Duffy* v. *Hobson,* 40 Cal. 240-245, 6 Am. Rep. 617, it must be held that they had not." *Grant* v. *Ede,* 85 Cal. 418, 24 Pac. Rep. 890, 20 Am. St. Rep. 237, is to the same effect. The rule is the same in New Jersey. In that state an agent may be authorized by parol to enter into a written contract which will bind his principal to convey real estate. It is held, however, that authority to sell, without more, will not authorize the agent to sign a written contract for his principal. In *Milne* v. *Kleb,* 44 N. J. Eq. 378, 14 Atl. Rep. 646, the court said: "Authority to make or sign a written contract is not conferred, where the thing to be sold is land, by giving an agent power, by parol, to sell. Chancellor Zabriskie, in *Morris* v. *Ruddy,* 20 N. J. Eq. 236, 238, said, following the rule adopted by the courts of New York, that 'giving authority to sell does not, by force of the terms, or by their general acceptation, give authority to sign the vendor's name to a contract. And in the case of lands it is not wise to extend their meaning by construction.' Mr. Justice Brown had previously, in *Hedden* v. *Shepherd,* 29 N. J. Law, 334, 345, said substantially the same thing. Both of these cases are cited with apparent approval by Mr. Justice Magie in pronouncing the opinion of the court of errors and appeals in *Young* v. *Hughes,* 32 N. J. Eq. 372, 383. In view of these judicial utterances, I think this court is bound to regard the rule above stated as established. The same doctrine has been recognized in England." On this point, in 1 Warv. Vend. 250, that author says: "There is an important distinction between an authority to find a purchaser and an authority to execute a contract of sale, which is constantly recognized and applied by the courts, and specific performance has often been refused where the transaction disclosed that the agent's powers were limited to the mere finding of a purchaser. Thus the expression, 'I will sell,' or its equivalent, accompanied by a specification of terms, does not confer any authority on an agent to make a contract of sale." Mechem on Agency states the same rule at section 966. In this case, as we have seen, the written authority which the defendant gave to Meis & Orcutt was merely the authority commonly possessed by real estate brokers, and nothing more. It did not, therefore, authorize them to sign the contract in question. The statutes of this state declare that contracts signed as this one was are invalid.

It follows that the judgment of the district court must be affirmed, and it is so ordered. All concur.

(92 N. W. Rep. 453.)

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J. H. LITTLE *et al. vs.* FRED WORNER *et al.*

Mortgage Foreclosure—Redemption—Use and Occupation.

In cases of purchasers in possession of premises under foreclosure of mortgages during the year of redemption the mortgagor is not entitled, under section 5549, Rev. Codes, to demand of such purchaser a verified statement of the value of the use and occupation of such premises during such period, and, in case the purchaser fails or refuses to furnish one on such demand, the period for redemption is not thereby extended until the determination of a suit to redeem.

Appeal from District Court, Richland County; *Fisk*, Special J.

Action by J. H. Little and Katie A. Little against Fred. Worner and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

George W. Freerks and *A. J. Bessie*, for appellants

J. A. Dwyer and *Charles E. Wolfe*, for respondents.

MORGAN, J. This action is brought to redeem certain real estate in Richland county from a foreclosure sale under a mortgage given thereon by the plaintiffs, as the owners, to the defendant Fred. Worner, on the 18th day of April, 1897. Default occurring in complying with the conditions of the mortgage, it was foreclosed on April 14, 1900, and regularly sold at foreclosure sale to Fred. Worner for the sum of $2,572.55, which included the debt, interest, and costs and disbursements of the foreclosure. The sheriff issued a certificate of sale to the said purchaser on that day, and he, on the same day, assigned it to his wife, Anna E. Worner, and she, on December 1, 1900, assigned said certificate to one F. B. Townsend, as security only. On March 9, 1901, the plaintiffs served on Fred. Worner, and later on the two other defendants, a notice demanding of the defendants "a written and verified statement of the rents and profits of the above-described premises for the year 1900, if any, and a written and verified statement of the value of the use and occupation of said premises for said year; * * * and you are further notified that such information is sought for the purpose of determining the amount necessary to redeem from the sale of said premises under the foreclosure of that certain mortgage," etc. The complaint states a failure to comply with such demand according to its terms, and that, in consequence of such failure, the plaintiffs are unable to determine the amount necessary to redeem, and demands judgment that the value of the use and occupation and profits of said premises be determined, and that such sum be offset against the amount due on the mortgage sale. The action was not commenced until the redemption period allowed under the statute had expired. The defendants each answered. The defendant Fred Worner, in his answer, denies that plaintiffs own the lands in

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question, and alleges that the defendant Townsend is the legal owner of 160 acres of said lands, in trust for the defendant Fred. Worner and his wife, and that, as to the other 160 acres, he, the said Fred. Worner, is the owner thereof in fee simple. He also denies that he failed or refused to serve on the plaintiffs a verified statement of the rents and profits of the lands in suit, pursuant to the notice served on him so to do, and further alleges that the plaintiffs are in the possession of all of said premises, except the cultivated portions thereof, and as to those, that they have been cultivated under an agreement with the plaintiffs, by which the defendant was to procure a renter to farm them, which the defendant did, for the reason that the plaintiffs were financially unable to farm them; that this defendant received, as rent for such premises, during the year 1900, from such renter under the contract, grains of the net value of $175.87; that the net proceeds of rent due defendant under this contract for the year 1901 cannot be ascertained at the time of answering such complaint. After a trial to the court under section 5630, Rev. Codes, the action was ordered dismissed. Judgment was entered on the order, from which judgment this appeal is taken. A review of all the issues is requested in this court.

The decision of this case depends on the construction to be given to section 5549, Rev. Codes. That section, so far as material, is as follows: "The purchaser from the time of the sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold, preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid." The section then provides that, if the redemption debtor demands a statement of the "rents and profits thus received," the redemption period is extended for five days after compliance by the purchaser, or, if the purchaser fails to comply with such demand, then suit may be commenced "to compel an accounting and disclosure of such rents and profits," and the redemption period shall be extended until 15 days after the determination of such suit. The facts are not in dispute in any material way. The defendant Fred. Worner was in possession of the cultivated lands during the year allowed for redemption. His possession was not actual or personal. He rented the cultivated lands to one Frundt under a contract by which he received a share of the crops grown thereon by Frundt. As to this crop, Worner made a statement of the amount of it to plaintiffs. It is contended that this statement is not a compliance with the section of the statute quoted. The plaintiffs' contention is expressed by them as follows: "The defendants' right to the occupation and possession of the land is not disputed, but the plaintiffs claim that they were, and now are, entitled to have

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the reasonable rental value of the lands credited upon their indebtedness under the mortgage, and, having given the notice provided for by section 5549 * * * and having received no sufficient verified statement, * * * the time for redemption is extended." The defendants' contention is that under no circumstances does this section of the statute apply to purchasers in possession after foreclosure, and that no notice is contemplated by said section in cases of possession by purchasers or their agents, but that it applies only to cases of possession by the mortgagor, or by tenants of the mortgagor, who have paid the rents or value of the use of the premises to the purchaser at the sale. This section of the statute has been under consideration by this court in two cases. In *Clement* v. *Shipley*, 2 N. D. 430, 51 N. W. Rep. 414, it was held that the section applied to purchasers at real estate foreclosure, and that the purchaser is entitled to the rents during the year of redemption as against the owner. In *Whithed* v. *Elevator Co.*, 9 N. D. 224, 83 N. W. Rep. 238, 50 L. R. A. 254, 81 Am. St. Rep. 562, it was held that the purchaser is entitled to maintain replevin to recover the share of the mortgagor of the land of the crops raised thereon by his tenant during the redemption period; that such share is included in the term "rents." The defendant Worner is admitted to have been in possession of the cultivated portions of these premises after the foreclosure. The foreclosure is admitted to have been regular and valid. Worner made a contract with one Frundt, under which Frundt was to farm the land, and turn over to him a specified portion of the crops raised thereon. It is a crop contract in the ordinary form. In answer to the demand for a verified statement from Worner, he complied therewith to the extent of stating how much he had received in bushels, and the value thereof in dollars and cents, after deducting the expenses incurred by him in furnishing seed and cost of threshing, pursuant to the terms of the contract with Frundt. Plaintiffs claim that this statement is insufficient, as not including anything more than the rents or profits received. They claim the entire value of the use during that year. They claim that Worner is a mortgagee in possession after foreclosure, and must account for the full rental value, called the "value of the use and occupation." The complaint alleges that the defendant has taken and had the use and occupation of the said premises by virtue of the sheriff's certificate of sale under the foreclosure of the mortgage herein mentioned. The possession of Frundt is claimed to be the possession of Worner, and such contention is accepted by the defendants. If in possession under the certificate of sale, he was not strictly a mortgagee in possession. The mortgage had been foreclosed, and the lien extinguished. The rights of the purchaser was measured by another instrument, the certificate of sale. If it be admitted that he was a mortgagee in possession for the purposes of this case, still the result would not be different. The question in this case is, what rights does section 5549 give to the purchaser

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and to the mortgagor after sale? What, then, are the rights of the respective parties under section 5549, Rev. Codes, in view of such possession? This section, as already construed by this court, gives the mortgagor the right to the possession of the premises sold pending the year for redemption, and gives the purchaser the right to the rent of such premises, or the value of their use, but to be applied as payments on the sum necessary to redeem in case of a redemption. In case of no redemption, the rents or rental value do not belong to the mortgagor if claimed by the purchaser. They are given to the mortgagee under such section. Does this section provide that, if the purchaser is in possession, and appropriating the value of the use, that a failure to state the amounts thereof on demand shall extend the right of redemption until a suit to redeem be determined? We think not. A reading of it shows that the provisions entitling the purchaser to the rent or the value of the use apply when the mortgagor is in possession, either personally or by tenant. No mention or allusion is therein made to possession by the purchaser. Possession by him does not seem to have been contemplated by that section. The provision in regard to demanding a statement of the rents received makes no mention of the value of the use and occupation. The sum of the rents or profits turned over by the mortgagor's tenant in possession to the purchaser is not known, and cannot well be definitely known, to the mortgagor. Hence he is entitled to receive a sworn statement of the amount from the purchaser, and, if not furnished, the redemption period is extended. No such reason exists in order to determine the value of the use, as that fact does not rest for determination alone with the purchaser. The basis and amount of credits to be allowed on account of the value of the use of the land by the purchaser is determinable without any information received from the purchaser, and there is no reason for a demand upon the purchaser, or postponing the time of redemption to ascertain that fact.

This section of the statute does not, therefore, authorize a demand upon the purchaser for a statement of the value of the use and occupation of the premises if occupied by the purchaser pending the year of redemption. The service of such demand was, therefore, a useless act of the plaintiffs, and gave them no rights under that section. It is not claimed that a purchaser in possession of the premises during redemption cannot be made to account for the value of the use of the premises while he is in possession, in case the mortgagor redeems. That is not the question in this case. The only question presented to the district court and to this court in this case is, has the redemption period been extended by virtue of the alleged fact that no statement of the value of the use of the premises was furnished, and whether the plaintiffs are now entitled to redeem? We decide that the time was not extended. If a statement of the rents and profits was held necessary to be made in this case, we think the defendant has made such

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statement. As said before, this section does not contemplate that the purchaser shall be in possession of the premises during the year of redemption, and contains no provision for making statements by the purchaser, except when he receives rents from the tenant of the mortgagor. Rents received from the purchaser's own tenant are not included in the terms of that section. That, however, does not deprive the mortgagor of the right to have them allowed as credits if he redeems. It does not, however, give him the right to an extension of the redemption time if such statement is not forthcoming after demand therefor. It follows that the plaintiffs have not shown a right to redeem.

Our conclusion is that the judgment must be affirmed. All concur.

(92 N. W. Rep. 456.)

STATE *vs.* OTTO W. THOEMKE.

Intoxicating Liquors—Illegal Sale.

Upon an appeal from a judgment in a criminal prosecution, wherein the defendant was convicted of the crime of maintaining a common nuisance in violation of section 7605, Rev. Codes, which is a part of the prohibition law, it is *held* that the verdict of the jury finding the defendant guilty is supported by the evidence. Whether the information and evidence would have sustained an order abating the nuisance is not involved or determined.

Evidence—General Reputation.

In cases where evidence of the good character or reputation of a defendant is admissible in his behalf, the evidence must be as to his general reputation in the community in which he resides, and, before a witness is competent to testify thereto, he must disclose a knowledge of the defendant's general reputation, and should not be permitted to give his own opinion as to it. It is *held*, therefore, that it was not error to strike out the testimony of two witnesses who testified to the defendant's reputation, but not to his general reputation, and who disclosed upon cross-examination that they had no knowledge of his general reputation.

Instructions not Misleading.

It is further *held* that the instructions upon which the case was submitted to the jury were not misleading, or prejudicial to the defendant, and that the motion for a new trial was properly denied by the trial court.

Appeal from District Court, Cass County; *Pollock*, J.

Otto W. Thoemke was convicted of maintaining a place wherein

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intoxicating liquors were sold in violation of law, and appeals. Affirmed.

J. W. Tilly, for appellant.

Emerson H. Smith and *George W. Newton,* for the State.

YOUNG, J. The defendant was informed against by the state's attorney of Cass county for maintaining a common nuisance in violation of section 7605 of the Revised Codes. The jury returned a verdict of guilty. Defendant moved for a new trial upon the alleged insufficiency of the evidence to sustain the verdict, errors in the admission of testimony and in the instructions, which motion was denied. The trial court imposed a sentence of 90 days in the county jail and a fine of $200 and costs of prosecution. The defendant has appealed from the judgment, and relies upon the same grounds in this court which were urged in support of his motion for new trial.

The first ground urged is that "the verdict of the jury is unsupported by the evidence." Section 7605, Rev. Codes, which defines the offense of which the defendant was convicted, so far as material, reads as follows: "All places where intoxicating liquors are sold, bartered or given away, in violation of any of the provisions of this chapter, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this chapter, are hereby declared to be common nuisances; * * * and the owner or keeper thereof shall upon conviction be adjudged guilty of maintaining a common nuisance." The offense which is made punishable by the above section is the keeping of a place where the forbidden acts are committed. In referring to this section in *State* v. *Dellaire,* 4 N. D. 312, 60 N. W. Rep. 988, this court said: "We notice that selling intoxicating liquors contrary to the provisions of this act does not constitute the offense. Nor does keeping intoxicating liquors for sale contrary to the provisions of this act constitute the offense. Neither is the offense committed by permitting persons to resort to the place for the purpose of drinking intoxicating liquors as a beverage. They are evidences of the offense. It is keeping the place where these things, or some of them, are done, that constitutes the offense. Proof of keeping by the defendant, and that any one of the prohibited acts was done by the defendant in such place during such keeping, would make the offense complete." In this case it is undisputed that the place at which the information alleged the prohibited acts were done was owned by and in the possession and control of the defendant; in other words, there is no dispute that the defendant was the owner and keeper of the place. The vital question was whether it was a common nuisance, under the above section. The state relied upon proof of unlawful sales by defendant to give the place that character. We have examined the evidence on this point, and find that the verdict of the jury has ample support. Andrew Prior, a witness

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for the state, testified to purchasing whisky from the defendant at his place on two different occasions,—at one time two quarts, at the other a single quart,—and that he divided the liquor so purchased among the members of a threshing crew. He also testified to purchasing beer from the defendant, and to being one of a number of persons, whom he named, who purchased from the defendant and divided among themselves a keg of beer. S. H. Bergrud, a witness for the state, also testified to purchasing a pint of whisky from the defendant, and also to being one of the persons who purchased and drank a keg of beer at the defendant's place. The defendant himself testified that he procured a keg of beer for his hired man, and charged it to him, and that this was drunk upon his premises by the hired man and five or six other persons. The defendant denied having sold whisky to Prior, or any one else, and claimed that one of the kegs of beer referred to by the witness belonged to his cousin, and that the keg which his hired man had was merely ordered by him, and that he did not sell it. He also called a number of persons to whom Prior had given portions of the whisky which he claimed to have bought from the defendant, who testified that Prior had stated to them that he did not get it from the defendant. Prior's explanation of these statements is that he was a friend of the defendant, and did not wish to get him into trouble. On this state of facts we cannot say that the verdict is not sustained by the evidence. Repeated sales by defendant are sworn to. The credibility of the witnesses, and the weight to be given to their testimony, was for the jury. In this case the state has not sought an order of abatement of the alleged nuisance. Whether the information and evidence would sustain such an order, had it been made, we need not determine. That question is not in the case. It is well settled that, where the prosecution is only against the person, an information charging the keeping of a place where the forbidden acts are committed is sufficient, and a conviction thereunder will be sustained. The rule is different where an abatement of the nuisance is sought. In the latter case the alleged nuisance must be particularly identified, so as to furnish a sufficient basis for the order of abatement. On this point, see *O'Keefe* v. *State*, 24 Ohio St. 175; *Segars* v. *State* (Tex. Cr. App.) 31 S. W. Rep. 370; *State* v. *Kreig*, 13 Iowa 462; *State* v. *Waltz*, 74 Iowa 610, 38 N. W. Rep. 494. It follows that the first ground urged by the defendant cannot be sustained and the same may be said of the defendant's exception to the entire charge of the court, based upon the ground that there is a total absence of evidence in the record that the defendant maintained a common nuisance.

Error is assigned upon the exclusion of the testimony of two witnesses, offered by the defendant, as to his reputation. Malcolm Morris testified: "I have been personally acquainted with Thoemke for the last three years. We live between six and seven miles apart. I have passed Thoemke's farm. It is a good farm, in good cul-

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tivation. He is counted one of the best farmers around Wheatland. His reputation as a law-abiding citizen is good, so far as I know." On cross-examination by the state's attorney he said, "I never talked with anybody about his reputation for obeying the law." A motion was then made and granted to strike out the testimony of this witness as to character, on the ground that he had not shown himself competent. In our opinion, no error was committed in this ruling. Assuming that this is a case where the defendant might properly introduce proof as to his general reputation or character, nevertheless the proof offered was not competent, for the reason that it was not as to his general reputation. The witness did not pretend to know or testify to his general reputation. The rule of the cases is stated in 5 Am. & Eng. Enc. Law (2d Ed.) 579, 580, as follows: "Character must be proved by witnesses who know the general reputation of the person in question, and, before evidence as to character is admissible, this knowledge must appear. * * * A witness as to character should not be allowed to speak as to his own knowledge of the acts and transactions from which the character or reputation of the person whose character is being investigated has been derived, but he must speak from his own knowledge of what is generally said of such person by those among whom he resides, and with whom he is chiefly conversant. The mere individual opinion of the witness as to the character which is the subject of inquiry is not admissible." The testimony stricken out was clearly the individual opinion of the witness, and not a statement of what the general reputation of the defendant was in the community in which he resided. The testimony of the other witness, Frank Morris, is identical with that of the above witness, and was stricken out for the same reason, and properly so.

It is also urged that the charge of the court in reference to the several kegs of beer which were drank upon the defendant's premises was misleading and prejudicial, particularly that portion relating to the keg of beer which defendant obtained and delivered to his hired man and charged to him. The particular language of the instruction excepted to is as follows: "It is claimed by the state that, as one of the ingredients of the offense charged was a sale to the defendant's hired man of a keg of beer under the circumstances as disclosed by the evidence. In that behalf I charge you that, if you believe from the evidence beyond a reasonable doubt that dedendant procured a keg of beer or other intoxicating liquor, so that the title and ownership thereof was in him; and that thereafter, on the premises mentioned in the information, he transferred the title to the same to his hired man by charging its value to him, or in any other manner constituting a sale thereof, then he would be guilty of selling intoxicating liquor in violation of law." The above instruction is based upon the testimony of the defendant himself, and we are unable to see wherein it is erroneous. The defendant admits that beer was drank upon his premises at the several times testified to

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by the witnesses, but claimed that it was merely upon the occasions of social gatherings; that he made no sales of the liquor, and that one of the kegs of beer belonged to his cousin. The defendant was given the full benefit of this defense in instructions which were, we think, entirely favorable to him. After referring to the section of the statute which the defendant is charged with having violated, the court said: "In so far as this statute is applicable to the claim of the defendant that it was a mere social gathering, I may say that it is directed against the unlawful sale, barter, and giving away of such liquors as a beverage as discloses an intention to violate the law. It is not a violation of the law for a person at a social gathering to give his guests a drink of intoxicating liquor, if that is not the sole purpose for which the gathering is had, and if the giving is simply an incident of the social gathering. If, on the other hand, the gathering is for the purpose of drinking intoxicating liquors as a beverage, then it is a violation of the law, and the permitting it to be drank upon the premises under those conditions would be a crime. You are, therefore, to take into consideration all the testimony bearing upon the manner in which the liquor, conceded to have been drank, was dispensed; and if you believe from the evidence that it was simply an incident to a social gathering, then for this act the defendant could not be guilty of the crime charged against him." We by no means wish to be understood as approving the correctness of the above charge, but limit our comment on the same to merely stating that it was not prejudicial to the defendant. The gist of the offense with which the defendant is charged is the keeping of a place where prohibited acts are alleged to have been committed. That he kept the place is not disputed, and there is ample evidence to sustain the finding of the jury that sales of intoxicating liquor were there made by him. Proof of the offense charged was thus complete.

Finding no error in the record, it follows that the judgment and conviction must be affirmed, and it is so ordered. All concur.

(92 N. W. Rep. 480.)

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WILLIAM H. ULMER *vs.* P. MCDONNELL.

Sale—Action for Price—Evidence.

The plaintiff, who is a contractor and dealer in cut stone, sues to recover a balance claimed to be due upon an alleged sale of stone curbing delivered to the defendant, to be used in connection with the latter's contract for paving the streets of Grand Forks. The defendant denies having purchased the curbing, and alleges that his contract with the plaintiff was merely to take the curbing from the cars and set it in place on the streets. The case was tried to the court without a jury. The trial court found that there was no sale of the curbing to the defendant, and that the defendant's contract was merely one of employment, as alleged by him, and rendered judgment accordingly. Upon plaintiff's appeal from the judgment, and a review of the entire case in this court, the findings and conclusions of the trial court are sustained, and the judgment affirmed.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by William H. Ulmer against P. McDonnell. Judgment for plaintiff, and he appeals. Affirmed.

Cochrane & Corliss, for appellant.

George A. Bangs, for respondent.

YOUNG, J. In this action, plaintiff has appealed from a judgment entered in the district court in his favor, and demands a trial anew in this court of the entire case. The complaint, for a first cause of action, states that in September, 1898, the defendant and plaintiff entered into an agreement whereby plaintiff agreed, out of materials to be furnished by himself, to manufacture, sell, and deliver to defendant on the cars at Grand Forks, N. D., 42,000 running feet of stone curbing, at the agreed price of 43 cents a foot; that under said agreement the plaintiff delivered to defendant, and defendant accepted, 26,656 feet of said stone curbing, worth, at the agreed price, $11,462.08, and that on account of said sale and delivery the defendant has paid the sum of $9,470.60, and that the balance due plaintiff is $1,991.48. For a second cause of action, the complaint charges, in effect, that defendant has wrongfully refused to receive or accept any of said curbstone over and above said amount of 26,656 feet, despite the fact that plaintiff was able and willing to deliver the same, and has repeatedly offered to deliver the same, and that, by reason of the defendant's refusal to accept all of the stone so sold, plaintiff has been damaged to the amount of his prospective profit, which is alleged to have been 26 cents per foot on 15,344 feet. "Plaintiff further alleges that he is engaged in the business of manufacturing curbing and building stone; that the capacity of his plant is limited, and that, by reason of the large contract which he had taken to deliver to defendant the said curbing, he was compelled to enlarge his plant for the special purpose

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of filling the said contract, and was also compelled to decline to take other contracts during the seasons of 1898 and 1899; and that in consequence thereof the plaintiff was damaged in the sum of $4,000 through the failure of said defendant to perform said contract,"— and prays for judgment in the sum of $12,589.40, with interest and costs. Defendant answered the complaint, denying every allegation thereof, and, by way of counterclaim, defendant alleged: That in the month of September, 1898, the plaintiff and defendant entered into a contract whereby the defendant agreed to take from the cars in the city of Grand Forks, and to there set in place, any and all W. H. Ulmer Dunville sandstone curbing shipped by the plaintiff to the city of Grand Forks as curbing to be used in connection with the paving to be done in said city. That for such service the plaintiff promised and agreed to pay defendant the sum of 8 cents per lineal foot. That under said contract the defendant hauled and set in place 22,789.6 feet of said curbing, which services were of the agreed value of $1,822.92. That in addition to the above services, the defendant rendered the plaintiff the following services under said contract, reasonably worth the sums as hereinafter set forth, to-wit: Hauling 3,869.4 lineal feet from cars to street, at 2 cents per foot, $77.39; setting in place 1,764 lineal feet, at 6 cents per foot, $105.84; taking out and replacing curbing and repairing paving and back-filling 700 feet of curbing, at 15 cents per foot, $105.00; taking out 1,064 feet after being set, at 2 cents per foot, $21.92; taking up, hauling, and piling of all rejected curbing, 3,869.4 lineal at 4 cents per foot, $154.77; making, in all, a total sum of $2,287.84. That no part of said sum has been paid, save and except the sum of $2,154, and that there is now due to the defendant the sum of $133.84, for which sum the defendant demands judgment. Briefly stated, the plaintiff's claim is that he sold the 42,000 feet of curbing in question to the defendant at an agreed price of 43 cents per foot. The defendant, on the other hand, denies that he purchased any of said curbing, and alleges that his contract was simply to transport it from the cars, and set it in place on the streets of Grand Forks, for an agreed compensation of 8 cents per foot. The case was tried to the court without a jury. Evidence was offered in support of the allegations of the complaint and answer. No testimony was offered by plaintiff in rebuttal, as against the items of the defendant's counterclaim. The trial court found against the plaintiff, and held that the defendant's contract with plaintiff was one of employment, to take the stone from the cars and set it in place, as pleaded in the answer, and allowed to the defendant the sum of $1,822.92 for transporting and setting the stone in place, and allowed upon the other items of the counterclaim the sum of $275.94, and, after charging him the sum of $2,154, which had admittedly been paid to him by the city of Grand Forks, in the form of paving warrants, awarded judgment against him for the difference, $55.15 and costs of the action.

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It is undisputed that the plaintiff shipped 26,656 feet of stone to Grand Forks, and that the defendant took the same from the cars, and set in place on the streets 22,186 feet. The rest of the stone is piled up at Grand Forks, and has not been set in the streets, except about 600 feet, which amount, after being set in place, was taken up by the defendant under the direction of the city council.

The decisive question for determination in this case is whether the stone in question was sold to the defendant, as plaintiff claims, or whether the defendant was merely employed to transport the stone from the cars, and set it in place, as alleged by him. The trial court found, as we have seen, that the defendant's contract was one of employment only. The majority of the court, after a careful review of the testimony, have reached the same conclusion. The contract between plaintiff and defendant was not reduced to writing. It is agreed that whatever contract was made was entered into at a single conversation which occurred between them at Grand Forks at a time when paving contracts were being let. This conversation occurred under the following circumstances: The city of Grand Forks had decided to grade, pave and curb certain streets, and, with a view to letting a contract therefor, had advertised for bids, to be based upon specifications of the items of the work to be done, which included the paving, excavating, and curbing required; the curbing being estimated at 42,000 lineal feet. Both plaintiff and defendant filed bids. The defendant's bid was for all the work, including excavating, paving, and curbing. His bid on the curbing covered two different kinds of stone,—one for 70 cents per foot, and the other for 74 cents per foot. The plaintiff's bid was for curbing alone, and included two kinds of stone,—one for Mankato limestone, at 58 cents per foot, and the other a sandstone curbing, at 51 cents per foot. At the time of making his bid, plaintiff presented to the city council a sample of the sandstone which he proposed to furnish. The bids were opened on September 19, 1898, and, after being considered, the city council appointed a special committee to consider the same, and to report on the following day. Both the plaintiff and the defendant appeared before this special committee. On the following day, the 20th, the committee reported to the council in writing as follows: "We * * * recommend that the contract for paving and curbing be awarded to P. McDonnell, provided he will agree to put in fifteen to twenty blocks of pavement before November 5, 1898. We further recommend that the Dunville sandstone be used for curbing at fifty-one cents per foot, or wood curbing at twenty-five cents per foot." On the same day the city council passed a resolution to the effect "that the contract for paving and curbing be awarded to P. McDonnell at the price named in his bid for cedar-block pavement, without tile, and that the Dunville sandstone be used for curbing, at fifty-one cents per foot." It is shown that the city council, as well as the special committee, were satisfied with Mr. McDonnell's offer as to the grading and paving, and that they were anxious that he should have the

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contract, but they were equally anxious that the plaintiff's curbing should be used. It was therefore important, from the city's standpoint, that the plaintiff and defendant should reach an agreement whereby the city could get it. The special committee of the city council therefore urged the plaintiff and defendant to get together and come to an understanding. In pursuance of this request, they retired to a hall outside of the committee room, and it was at this place and time that the conversation in question occurred. After the conversation, they returned to the committee room and reported their agreement to the committee. The testimony of the parties as to what the conversation was is in conflict. The plaintiff testified as follows: "The bids were opened there. Mine was opened and read, and defendant's bid was opened and read. The matter was referred to a special committee, and I attended a session of that committee next day. Mr. McDonnell also was present. In relation to that committee, they had me in there to discuss with me the quality of the stone,—fix up a deal where I could furnish Mr. McDonnell the stone; and we talked it over (me and Mr. McDonnell) for quite a while there, and I agreed to deliver him this stone at forty-three cents a foot f. o. b. cars Grand Forks; and he finally agreed with that committee, I guess, to go on and take the work, and they so reported, and he got the contract that evening. * * * I think that me and Mr. McDonnell had the talk in the hall. * * * That is the substance of the whole talk between me and Mr. McDonnell until after they had a meeting that night, and after they awarded him the contract he wanted to know if I could get out stone fast enough. He wanted to put in fifteen or twenty blocks that fall. I told him I would certainly do all I could,—I would put in electric light and work day and night,—and went to the quarry and got the derrick up and got the stone started." On cross-examination, plaintiff said: "He wanted to know what I would allow him for setting it, and I told him that I would allow him 8 cents a foot, delivered on the cars here. Our agreement was I should get 43 cents per foot for the stone f. o. b. Grand Forks, here, and my contract expired at that time,—he to take and put it in the ground,—and I don't know what he got. I mean to say that I don't know what Mr. McDonnell got for putting that stone into the ground. I told him I would do it for 43 cents. My price was 51 cents; that including the setting of it in the ground. What I mean by allowing him 8 cents a foot is that I took that 8 cents from my contract price, and he was to pay me 43 cents." Testifying as to payment, plaintiff said: "He wanted to know if I could use any warrants, and I told him I could. He was to pay me as he was paid by the city, and in city warrants. He turned over city warrants to me and some cash." The defendant testified, after stating that he did not at any time agree to purchase the stone or any stone from the plaintiff, that: "Then I wasn't going to take the contract, because I didn't get in my own stone,—his stone wouldn't be leaving me any profit; so they had a special meeting in Mr. Clifford's office,

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and called Mr. Ulmer and myself there. Then I told them that I couldn't hardly care to take Mr. Ulmer's stone; and I think it was Mr. Turner said: 'Well, we will have to throw all the bids out and readvertise,' or some such thing. So there was some other member of the committee spoke up and said, 'You and Mr. Ulmer are here, and why not go outside and talk the thing over, and see if you can come to some conclusion?' Or before we went out I said I couldn't take the contract. They wanted me to take the contract, and let Mr. Ulmer take the curbing. I told them I didn't think I could do that. Finally, then, some one suggested for him and I to go outside and talk it over; so we stepped outside of the committee room, and I asked him what he would allow me a foot to take that from the cars and set it in place. He told me he would give me eight cents a foot. I told him that wouldn't leave anything in it for me,—it would cost more than that to put it in; but I said I would do it for ten cents or twelve cents. 'No,' he said, 'that is my price. It is all right, and you have to take it for that.' So I finally agreed to take it from the cars and set it in the street for eight cents a foot, and I was to pay him as I got paid from the city for what I put in the street, and give him the city engineer's estimate as I got that. That is practically all the contract Mr. Ulmer and I had, that I remember of. That was all that was talked over. There was no other contract. That was all the contract there was. Then we went back to the committee and told them what we done, and so on; and then, in conclusion, the committee awarded me the contract. Mr. Ulmer was to take the warrants, the same as I got, and I should pay the same as I got; but afterwards there was some time I disposed of warrants, and I could do that, and it was an accommodation to him, and I gave him some money, instead of warrants, as I was getting rid of the warrants."

It will thus be seen that their testimony is in square conflict. The plaintiff testifies, in effect, to a contract for the sale of stone to defendant. The defendant, on the other hand, explicitly denies any conversation from which a contract of sale might be deduced, and narrates in detail a conversation which, if it occurred, establishes the transaction as one of employment and agency on his part. This court is unanimous in the conclusion that, if there was no other evidence in the case than that above quoted, the plaintiff would necessarily fail, for the reason that he has failed to sustain the burden of proof necessary to establish his cause of action. The case is one in which resort must be had to surrounding facts and circumstances for the purpose of determining where the truth lies. From a consideration of such facts and circumstances, the court has reached the conclusion that the defendant's contract was one merely of employment, and that the finding of the trial judge, who had the superior advantage of hearing the testimony as it fell from the lips of the witnesses, was entirely correct, and must be sustained. Conclusive evidence to that effect is afforded by the conduct of the parties themselves. As we have seen, they reported their oral ar-

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rangement to the city authorities. As soon as they reported such agreement, and it was settled that plaintiff's curbing would be used, the plaintiff left for his home, in St. Paul. On the following day, the city authorities, to whom the agreement had been reported, caused the city attorney to prepare a written contract for the paving, curbing, and grading in question, and the same was signed by the authorities of the city and by McDonnell. The contract was prepared with great care, and includes recitals of the advertisement for bids, and a statement of the bids submitted, with prices for the various kinds of paving and different kinds of curbing. In said contract, McDonnell agrees to furnish all labor and materials to complete the contract; and it is provided that all work shall be done under the direction of the city engineer, and that all material furnished shall be subject to the approval of the city engineer. The contract further provides "that all curbing shall be done with the W. H. Ulmer Dunville sandstone, unless otherwise directed by the city council," and the right is reserved to change this curbing and use other curbing upon 10 days' notice. The amounts to be paid for the different kinds of paving and kinds of curbing are stated separately and in detail, and it is agreed that payments due upon the contract shall be made in paving warrants issued from time to time upon semi-monthly estimates of the work done, as made by the city engineer. The defendant's relation to the plaintiff and to the city in reference to the curbing which plaintiff had induced the city to accept for paving purposes, is clearly defined in the following provision, which is inserted in the contract in question: "It is further stipulated that the party of the second part [McDonnell] shall not be held responsible in any way to the city of Grand Forks for the furnishing and delivery from the quarry to the station in the city of Grand Forks of the W. H. Ulmer Dunville sandstone curbing mentioned in the proposal and in this contract, or for the durability of said sandstone; it being the intent hereof that the party of the second part shall be responsible to the city of Grand Forks only for the delivery of said stone from the cars in the city of Grand Forks to the place of work, or using the same, and for the proper setting of the stone." It is patent, in view of the provisions of the contract just quoted, that McDonnell did not sell or contract to sell the stone in question to the city; and it is absurd to believe that he would enter into this contract, wherein, as we have seen, the city reserved the right to use other than the Dunville sandstone, if he had in fact, as plaintiff contends, not 24 hours previously, bought outright 42,000 feet of plaintiff's stone, which might or might not be received, at the city's option, involving a personal obligation of $18,000. It is both improbable and absurd. It is true, Ulmer did not sign this contract, and was not present when it was executed, but it was made between the city authorities and McDonnell almost immediately after the plaintiff and McDonnell had reported to the city council what their agreement was; and it is entirely reasonable to

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infer that the written stipulation in reference to the defendant's relation to the stone truly represents the agreement which the parties made and reported to the city council. Further, there is not a single suggestion or circumstance disclosed in the entire record even tending to show that McDonnell at any time has in any way treated his contract with the plaintiff as being in any respect different from that testified to by him. The plaintiff's conduct also negatives the idea of a sale to McDonnell. No such claim was made by him until this action was commenced, in December, 1899. Not only was no claim made by him that he had sold the stone to McDonnell, but his conduct has been inconsistent with a sale. This is shown by numerous acts, some of which we will mention: In December, 1898, some of the stone which had been delivered and was upon the streets of Grand Forks could not be used because of the extreme cold weather. It is undisputed that the plaintiff paid McDonnell $12.50 for taking care of it. The reason given by plaintiff is that he did this "because he did not want it piled up outside." This exercise of the right of ownership after it was unloaded does not harmonize with his present claim that he sold it to McDonnell f. o. b. cars Grand Forks. Again, it appears that at all times prior to the commencement of this action, the plaintiff looked to the city for his pay. On July 2, 1899, he wrote to McDonnell as follows: "Get as big an estimate as you can on the work to-morrow night, and send it to me as soon as possible, so I can pay the men and freight. We have got up there now 27,000 feet of curb altogether,—what I shipped this fall and last spring." And again, on September 1, 1899, he wrote to McDonnell: "I wish, as soon as you get the estimate, that you would send me a check before the 10th of the month, as it is my pay day, and I am figuring on getting the money from you for the same." As the work progressed, the plaintiff was paid by paving warrants, which were transmitted by McDonnell, issued upon the estimates made by the city engineer. In some instances McDonnell disposed of the warrants, and sent cash instead, for Ulmer's accommodation. It appears that in 1899 objection was made, by property owners upon whom the burden of payment ultimately rested, to the plaintiff's stone, and upon petition from such owners the city council decided to use other stone for curbing, under the right reserved in the contract to make such change. McDonnell notified the plaintiff not to ship any more stone. Upon receiving this notice, Ulmer made no demand upon McDonnell for a settlement or for payment. Neither did he claim that McDonnell had agreed to purchase either the stone then delivered, or the entire 42,000 feet, as he now claims. The evidence shows that the plaintiff, upon the rejection of his curbing, came to Grand Forks and employed as counsel the firm of Cochrane & Corliss; and, after stating the facts to them, said firm, under date of October 31, 1899, wrote to the defendant the following letter: "P. McDonnell, Esq., City—Dear Sir: Mr. Ulmer was here yesterday, but failed to find

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you; and, as he was unable to remain, he has left his matters in our hands to look after. He says there is some money in your hands which he wishes paid at once, as he is in need of money himself. Will you kindly call at the office at your earliest convenience, and see us about this matter, so that we can understand just what the situation is." This demand plainly proceeds upon the ground that McDonnell then had in his hands money which he had received from the city, which Ulmer claimed belonged to him, and a position which is utterly inconsistent with the present claim that the stone was sold to McDonnell, and that the latter owed Ulmer for it. The evidence shows that thereafter, and on November 19, 1899, the sum of $392.50 was paid to Cochrane & Corliss by McDonnell for the plaintiff, pursuant to the above demand. Again, John Dinnie, the mayor of Grand Forks, testified that the plaintiff informed him that "he would hold the city for the stone, and that he would sue the city for the difference in the stone,—the stone that he did not use,"—and that he did not remember that plaintiff mentioned any demand or claim against McDonnell. The plaintiff does not deny having this conversation with Dinnie. He says: "I might have had a conversation with Mr. Dinnie with respect to this contract. I told him I should try to hold McDonnell, and, if I could not, I should hold Grand Forks; that I should hold Mr. McDonnell and the city of Grand Forks both, if I could. I qualified myself in that way. At that time I guess I had a conversation with Mr. Turner in respect to this matter, and told him I intended to sue McDonnell and the city of Grand Forks. That was before I consulted Judge Corliss. After I consulted with him, I concluded to sue McDonnell. He said my contract was with McDonnell, and I sued." It thus appears that the present theory of the sale of the stone to McDonnell was born of the exigency in which the plaintiff found himself upon the rejection of his curbing by the city, and this is less than one month before this action was commenced. It goes without saying that if plaintiff had sold the stone to McDonnell, as he now claims (the transaction involving something like $18,000), he would have known that fact. In addition to the convincing effect of evidence which we have recited, due weight must also be given to the fact that the plaintiff's theory of a sale to McDonnell is utterly improbable. It is conceded that there was no profit whatever for McDonnell in connection with the curbing, and a probably loss, and this fact was known to all parties when the arrangement between the plaintiff and defendant was made, whereas it appears, and the plaintiff alleges, that his profit upon the stone, after allowing 8 cents per foot for setting it in place, was 26 cents per foot, or an alleged profit of $10,920 on the entire 42,000 feet. It is absurd to conclude that a man of ordinary prudence, under such circumstances, would buy the stone outright, and this at a time when he had no contract with the city, and then immediately enter into a contract with the city, in which the city reserved the right to use other stone, as was

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done in this case. It is usual for the person having the profits of a sale to bear the burden of such losses as are incidental to a rejection of the property sold. Plaintiff has entirely failed to show a sale to McDonnell, and consequently cannot look to him to recoup his loss. What the plaintiff's rights are as to the city, we need not discuss or determine. The city is not a party to this action. It is sufficient for the purposes of this case to say that the defendant did not agree to buy the tone, and that his contract with the plaintiff was merely to transfer the stone and set it in place, as alleged in the answer and found by the trial court.

Counsel for appellant does not specify in his brief that any items of the counterclaim as found and allowed by the trial court for removing and piling up the rejected stone were erroneously decided. We assume, therefore, in the absence of such specifications, which are required by rule 12 (74 N. W. Rep. viii) of the revised rules of this court, that the items were correctly found. The entire argument of appellant's counsel goes to the character of the contract.

Having reached the conclusion that the defendant did not buy the stone, but that the contract was merely one of employment, it follows that the judgment of the trial court must be affirmed, and it is so ordered. All concur.

(92 N. W. Rep. 482.)

O. P. NOKKEN *vs.* AVERY MANUEACTURING COMPANY.

Negligence—Not Error to Submit Question to Jury.

It is *held*, in an action to recover damages caused by the alleged negligent blowing of a whistle on defendant's threshing engine, that the jury did not act capriciously or arbitrarily in rejecting the testimony of the defendant's engineer, who testified that he did not blow the whistle, in view of other evidence in the case tending to contradict him, and that the court did not err in submitting the question of the defendant's negligence to the jury.

Pleading—Damages Allegation of a General Sum Sufficient.

In an action to recover damages for injuries caused by a single act of negligence, it is not necessary to allege in the complaint the separate items of damage resulting therefrom. It is sufficient to allege a general sum, without specifying the particular items.

Evidence—Sufficiency, Test of.

The sufficiency of the evidence to sustain an item of damage sought to be recovered is not properly raised by a motion to strike out the evidence as to such item, and it is not error to refuse to strike out the evidence when it is competent. The test of the sufficiency of the evidence to sustain an item of damage should be presented to the court by a request that the jury be directed to disregard the particular item of damage. Kolka v. Jones, 6. N. D. 461, 71 N. W. Rep. 558, 66 Am. St. Rep. 615, followed.

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Motion for New Trial.

It is *held* that the trial court did not err in denying defendant's motion for a new trial.

Appeal from Ditsrict Court, Cass County; *Pollock*, J.

Action by O. P. Nokken against the Avery Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Turner & Lee, for appellant.

Morrill & Engerud, for respondent.

YOUNG, J. This is an action to recover damages for injuries to plaintiff's person and property alleged to have been caused by defendant's negligence. The jury returned a verdict in favor of plaintiff in the sum of $600. The defendant made a motion for new trial, based upon alleged errors of law occurring at the trial, and upon the alleged insufficiency of the evidence to sustain the verdict. Defendant has appealed from the order overruling the motion.

Plaintiff, in stating his cause of action, alleges that for a number of years the defendant has been engaged in handling farm and other machinery in the city of Fargo, and that its place of business is on the south side of Northern Pacific avenue, in said city; that on the 16th day of July, 1901, the defendant had a threshing machnie and engine in operation at its said place of business near said avenue; that it operated the same in a careless and negligent manner, making a great and unnecessary noise in letting off steam, and blowing the whistle of the engine in such a manner as was calculated to frighten horses of ordinary gentleness; that the street was partially torn up at a point opposite defendant's place of business, so that it was necessary for teams to pass close to the threshing machine and engine; "that on said date, and while said defendant was running and operating said threshing machine and engine in a careless and negligent manner, as aforesaid, plaintiff, without any knowledge on his part of what defendant was doing, drove along said Northern Pacific avenue with two horses properly harnessed to a wagon, said horses both being of ordinary gentleness and roadworthiness; that as plaintiff, in driving as aforesaid, reached a point on said avenue directly opposite defendant's said engine and threshing machine, the defendant negligently and carelessly caused the whistle to be blown with a loud and unnecessary noise, causing plaintiff's horses to become frightened and unmanageable, and plaintiff was thereby violently thrown from the wagon, and in their fright said horses were badly injured and the wagon broken; that, by reason of being thrown from the wagon as aforesaid, plaintiff was badly injured, and caused to suffer great pain and anguish, and was made sick, sore and lame, and permanently injured in his body, head, hands, legs, and nervous system, and was thereby rendered unable to attend to his business for a period of over two months, and was put to great expense for medical attendance and nurse

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hire; that by reason thereof the plaintiff has been damaged in the sum of two thousand dollars."

With the exceptions to be hereafter noted, it is not claimed on this appeal that the facts thus alleged are not sustained by the evidence. For the purposes of this appeal, they may therefore be taken as true, except in those particulars which we will hereafter consider. It is contended in the first place that "there is no evidence tending to connect the defendant with the blowing of the whistle." Defendant moved for a directed verdict on this ground, and the same was overruled. This is assigned as error. In our opinion, error was not committed in this ruling. The fact is not controverted that it was the whistling of defendant's engine which frightened plaintiff's team, and caused the injuries to his person and property for which he sues. It is also an undisputed fact in the case that the engine was steamed up on the day in question under the direction of the defendant. I. J. Haug, the defendant's managing agent at Fargo, testified that there was an excursion on that day to the Agricultural College; that his company had the engine fired up, and were operating it about 16 feet from the sidewalk. He also testified that a number of other dealers in threshing machines had rigs steamed up and running in front of their places of business for exhibition purposes. He says: "I think these excursions had been coming to Fargo for some time before that, and there had been a fire festival, and all these different companies had their engines steamed up at the time of the fire festival; and during the fire festival we all tried to whistle the most we could, because the one that whistled the most drew the crowd, and we had our machine on inspection, and, as our machine is new in North Dakota, we wanted to draw attention to it. On the day of the accident I do not know who blew the whistle. A man named Peter Sandstrom was our engineer that day. I did not pay any attention to the whistle. The first I knew of the accident was when I was called out there, and the chief of police told me they were blowing the whistle, and for me to stop them." Anfin Monson, a witness for plaintiff, testified that he saw the plaintiff's team run away, and heard the whistle blow, "and heard it blow at different times before that." Swan Johnson, a policeman, a witness for plaintiff, testified that he did not see plaintiff at the time of the runaway, but did see him after the injury. He says: "I do not remember how long the defendant operated this engine that day, but they were around there working at different times. The whistle blew off and on." R. M. Pollock, a witness for plaintiff, testified that he was driving on Northern Pacific avenue, and almost opposite the engine in question, when the runaway occurred. He says: "A very sharp, shrill whistle was blown from a threshing engine that stood there, and plaintiff's team sprang forward. The whistle blew again, twice of three times. The whistle came from a threshing machine that stood on the south

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side of the avenue, pretty close up to the sidewalk. I saw a man standing on something next to the engine, or something attached to it like a platform. He was facing south, with his back to the north, next to me, and facing the engine. I do not know that he was the man who blew the whistle. I did not see him doing anything, but I saw no other man at the engine. The whistle was a long, sharp scream. It was not a long-continued whistle. It was very loud and very sharp, but not prolonged. My recollection is, the accident occurred just before or just after 12 o'clock." Peter Sandstrom, who is referred to in the testimony of the defendant's manager, above quoted, testified in behalf of the defendant as follows: "I run the engine all day. * * * I did not blow the whistle on the engine during the day; never touched it. * * * It had no string on it, and in order to blow it, one would have to crawl up on the side of the engine. It could not be blown by a person standing on the platform." This witness also testified that he shut the engine down and went to dinner about noon, first going to Moorhead, and that as he returned he saw the broken wagon. The contention of the defendant is that the testimony of Peter Sandstrom, the engineer, shows conclusively that the whistle was not blown by the defendant, or any of its agents, servants, or employes. It is evident that the jury rejected the testimony of this witness. Counsel for defendant contend that no proper grounds existed which would authorize the rejection of his testimony. The rule is, no doubt, as counsel contend, that a jury has no right to capriciously or arbitrarily reject the testimony of witnesses who are in no way impeached or discredited. 3 Jones, Ev. 904; *Newton* v. *Pope*, 1 Cow. 109; *Lamb* v. *Transportation Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Elwood* v. *Telegraph Co.*, 45 N. Y. 549, 6 Am. Rep. 140. The discrediting of Sandstrom's testimony, in our opinion, was not, however, arbitrary or capricious. There is evidence in the case, given by a number of other witnesses, who are disinterested, flatly contradicting his testimony. For instance, several witnesses testified that the whistle was blown at different times during the day. The testimony of R. M. Pollock is to the effect that it was blown while a man was standing upon the platform, whereas Sandstrom's testimony is to the effect that it could not be blown by a man standing in that position, and that it would not blow unless pulled by some one. In view of this conflict, it is apparent that the testimony was not rejected capriciously, and that there is evidence fairly tending to connect the defendant with the blowing of the whistle which caused the injuries. The motion for a directed verdict was therefore properly overruled.

It is next urged as grounds for new trial that the court erred in admitting evidence over defendant's objection as to the extent of the injury to plaintiff's wagon and to his team, and as to the doctor's bill, and in refusing to strike such evidence from the record. Eight of the assignments of error relate to these rulings. In our opinion, no error was committed in the rulings complained of. Counsel's ob-

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jection to the evidence as to these items is that "there is no allegation in the complaint as to these damages." The allegations of the complaint are sufficient to authorize the introduction of evidence on these elements of damage. The complaint, after alleging defendant's negligence, sets out the items of injury proximately resulting therefrom, viz., injury to his person; the incurring of expense for medical attendance; injuries to his team and wagon. It is true, the complaint does not state separate sums as items of damage resulting from the defendant's alleged negligence, but this was not necessary. The injury to plaintiff's person and property occurred at the same time, and was the result of the same act of negligence, and constituted but one cause of action. In such cases it is sufficient to allege a general sum as damages, without specifying the separate items or elements which enter in to make up the sum total of damages. *Shepard* v. *Pratt,* 16 Kan. 209; *Montgomery* v. *Locke* (Cal.) 11 Pac. Rep. 874; *Stickford* v. *City of St. Louis,* 7 Mo. App. 217; *Binicker* v. *Railroad Co.,* 83 Mo. 660; *Lamb* v. *Railway Co.,* 33 Mo. App. 489; *Von Fragstein* v. *Windler,* 2 Mo. App. 598; *Dooley* v. *Railway Co.,* 36 Mo. App. 382; *Hoffman* v. *Dickinson,* 31 W. Va. 142, 6 S. E. Rep. 53; Suth. Dam. § 424.

It is also urged that the testimony is insufficient to sustain these items of damage. The reason urged by appellant's counsel in their brief is "that there is no sufficient proof as to what such damages were, for the reason that the proof does not show that the amounts testified to were reasonable, or that the repairs were necessary, or that the doctor's bills were reasonably worth the amount charged or testified to, and that there is no proof that said bills were paid." The question as to the sufficiency of the evidence to sustain these three items was not presented to the trial court, and is not involved in the errors assigned in this court. The plaintiff testified to the amount of his doctor's bill, the amount of the bill for repairing his wagon, and the amount of the injuries to his team. No objection to the evidence was made upon the ground now attempted to be urged. It is true, a motion was made to strike the evidence from the records. This motion was properly overruled. The evidence was competent. No request was made to the court to instruct the jury to disregard these separate items. The rule laid down by this court in *Kolka* v. *Jones,* 6 N. D. 461, 71 N. W. Rep. 558, 66 Am. St. Rep. 615, is that: "Where evidence is competent so far as it goes, but is not sufficient to establish a case or a right to certain damages, it is not error to refuse to strike out such evidence. The party should ask for a directed verdict, or move the court to charge the jury that the plaintiff has failed to make out a case, or to establish a right to recover the particular damages, as the case may be."

It is also contended that the trial judge expressed a belief, in certain instructions to the jury, which were excepted to, that the defendant caused the whistle to be blown. We have examined the instructions referred to, and find no foundation in their language for any such criticism.

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This covers all the assignments which have been argued. No reasons or authorities having been presented in support of the remaining assignments, they are, therefore, under rule 15 of the revised rules of this court (74 N. W. Rep. x), deemed to be abandoned.

Finding no error in the record, the order appealed from will be affirmed, and it is so ordered. All concur.

(92 N. W. Rep. 487.)

KERNAHAN DICKSON *vs.* ELIZABETH M. DOWS.

Discretion of Court—Reversal only for Error or Abuse.

The granting or refusal of a preliminary injunction, as well as the dissolution of the same, rests in the sound judicial discretion of the trial court, and the exercise of such discretion will not be reversed or controlled by this court except for error or abuse.

Preliminary Injunction—General Rule.

The general rule is that a preliminary injunction will not be granted for the purpose of taking property from the possession of one person and placing it in the possession of another.

Order Dissolving Temporary Injunction Properly Made.

It is *held* that the order of the trial court dissolving a temporary injunction issued in this action was properly made, and is therefore affirmed.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Kernahan Dickson against Elizabeth M. Dows. From an order dissolving a temporary injunction, plaintiff appeals. Affirmed.

David R. Pierce (*Newton & Smith*, of counsel), for appellant.

George H. Phelps and *Turner & Lee*, for respondent.

YOUNG, J. Plaintiff has appealed from an order made by the district court of Cass county on April 17, 1902, dissolving a preliminary injunction issued on April 1, 1902, which in terms enjoined the defendant, her agents and servants, from interfering in any way during the pendency of this action with the occupation by plaintiff of a certain tract of farming land situated in said county, which the plaintiff had sold to the defendant on April 1, 1900, upon what is known as the "crop-payment plan." The purpose of plaintiff's action is to foreclose the defendant's interest in said land under said contract. The preliminary injunction or restraining order was issued at the commencement of the action, and was based upon the complaint and upon plaintiff's affidavit. It appears therefrom that the defendant agreed in said contract to farm the land in question in a particular manner, and to turn over to plaintiff one-half of the crop produced each year, to be applied upon the purchase price, and

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to pay all taxes. The complaint alleges that default had been made by the defendant, in not turning over all of the plaintiff's share of the crop grown in 1900, and in failing to turn over any portion of the crop grown in 1901, and in failing to pay certain taxes which the plaintiff alleges that he was compelled to pay, and that by reason of such defaults there is due and owing to the plaintiff the sum of $1,229.57, for which sum the plaintiff prays judgment, and further prays "that a decree may be entered herein * * * that the defendant be required to pay to the plaintiff the amount which the court shall find to be due and owing under the terms of said contract, and that such payment shall be made within thirty days from the date of the decree herein, and that, in default of such payment within such specified time, the defendant shall be forever foreclosed of all right, title, or interest in said premises, and all right to redeem the same, and that the plaintiff be put in full and immediate possession of the lands described." The plaintiff's affidavit, after alleging the making of the contract and the defendant's default thereunder, states "that the plaintiff has reason to believe and does believe that the defendant will seed and occupy said land during the cropping season of 1902, contrary to the express terms of said written contract, and against the rights of the affiant and plaintiff herein, and to the great damage of the plaintiff," and asks for an order restraining the defendant from seeding or attempting to seed the premises during the year 1902, or at any time thereafter, and from interfering with the occupation of the premises by the plaintiff; further, that the plaintiff will, upon the final hearing of the case, ask the court to determine the amount due, and to decree that the same, as found by the court, shall be paid within 30 days from the date of the decree, and that in default of such payment the defendant's rights shall be cut off; and, further, that if the plaintiff is permitted to seed the farm, and the defendant shall make the payments which the court shall find to be due, within the time to be fixed by the court, the plaintiff will surrender the premises, and the crops growing thereon, upon payment by the defendant of such expenses as the plaintiff may have incurred in seeding the crops. On April 12, 1902, the court issued an order to the plaintiff to show cause why the before-mentioned preliminary injunction should not be dissolved. The order to show cause was based upon the affidavit of George H. Phelps, defendant's attorney in the action. The affidavit, among other things, stated that the defendant had a good defense, and intended to answer the complaint; that the defendant then had a large portion of the premises ready for crop, and that it was necessary that work should be begun thereon at once; that defendant had prepared to put in the crop in the manner in which she had agreed to do, under the terms of her contract; that she has been in the undisturbed possession of the premises at all times since the making of the contract; and that the same is now in full force and effect. After a hearing upon the order to show cause, the trial court entered

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its order dissolving the preliminary injunction, from which order this appeal is prosecuted.

It is clear that the trial court did not abuse its discretion in dissolving the temporary injunction. The order appealed from must therefore be affirmed. The granting or refusal of a preliminary injunction, as well as the dissolution of the same, rests in the sound judicial discretion of the trial court, and its order granting or refusing the same will not be reversed except for an abuse of discretion. As this court said in *Donovan* v. *Allert,* 11 N. D. 289, 91 N. W. Rep. 441, "A wide discretion is vested in trial courts when granting or refusing preliminary injunctions, and appellate tribunals will hesitate before interfering with the exercise of such discretion by the trial courts." The same rule is stated in 10 Enc. Pl. & Prac. 1029, in the following language: "The dissolution of a preliminary injunction, like the granting of one, is a matter resting largely in the discretion of the court to which the motion to dissolve is addressed; and, except in case of palpable error or abuse of discretion, the action of the court will not be disturbed on appeal, or otherwise retsrained or controlled. A motion to dissolve an injunction is an appeal to the favor of the court, and regard must be had to the degree of inconvenience and expense to which continuing the injunction would subject the defendant in the event of his being right, as well as the loss which would accrue to the plaintiff if it should turn out that his complaint is well founded; and the discretion should be exercised in favor of the party most liable to injury, and so as to prevent injustice." See cases cited in notes 4 and 1. It is entirely apparent, we think, that there was no abuse of discretion in making the order appealed from. The plaintiff's complaint, as we have seen, recognizes the rights of the defendant in and to the premises in question until the same shall be cut off by a decree, and a failure of the defendant to redeem. The practical situation which confronted the trial court was whether the defendant or the plaintiff should have the possession of the land for the purpose of seeding, and pending the action. Under the circumstances disclosed, the trial court very properly refused to interrupt the defendant's possession, and to prevent her from exercising her rights over the land. This was a proper exercise of discretion, and to have done otherwise would, we think, have been an abuse of discretion. This conclusion is based upon the assumption that the case is one where the trial court might or might not, in its discretion, grant a preliminary injunction; but we think the case clearly comes under the general rule that a preliminary injunction will not be granted to take property out of the possession of one party, and transfer it to the possession of another. That such is the rule, there can be no doubt. 1. Spelling, Inj. (2d Ed.) § 31; 1 High, Inj. § 4; *Ex parte Conway,* 4 Ark. 302; *Kelly* v. *Morris,* 31 Ga. 54; *Farmers' R. Co.* v. *Reno, O. C. & P. Ry. Co.,* 53 Pa. 224. In the case last cited the court held that: "The sole object of a preliminary injunction is to preserve the subject of

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the controversy in the condition in which it is when the order is made. It cannot be used to take property from one party and put it into the possession of another." There are no facts in this case which make it an exception to the above rule.

It follows that the order appealed from must be affirmed, and it is so ordered. All concur.

(92 N. W. Rep. 797.)

KERNAHAN DICKSON *vs.* ELIZABETH M. DOWS (DOWS, *Intervener*).

Intervention—Interest Must Direct and Immediate.

The interest in a matter in litigation which will authorize a person to intervene in an action under section 5239, Rev. Codes, must be such a direct and immediate interest that the person seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.

Failure to Strike Out Complaint which Fails to Disclose Interest of Intervener is Error.

It is *held* that the complaint in intervention in this action does not disclose that the intervener has any interest in the matter in litigation, which is the foreclosure of a contract for the sale of land, or that he would gain or lose as a result of the judgment to be rendered in the action. The district court therefore erred in refusing to strike out its ex parte order permitting him to intervene.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Kernahan Dickson against Elizabeth M. Dows. Edwin L. Dows, by H. W. Gearey, his guardian, intervened. From an order refusing a motion to set aside an order permitting the intervention, plaintiff appeals. Reversed.

David R. Pierce and *Newton & Smith*, for appellant.

Turner & Lee, for respondent.

YOUNG, J. The plaintiff appeals from an order of the district court of Cass county refusing his motion to vacate and set aside an order previously made permitting Edwin L. Dows, an incompetent person, by H. W. Gearey, his guardian, to intervene in the action. The action is brought for the purpose of cancelling and foreclosing a contract whereby the plaintiff, Kernahan Dickson, agreed to sell and convey to the defendant, Elizabeth M. Dows, 320 acres of farm land situated in Cass county, upon the crop-payment plan. The defendant answered the complaint, and at the same time Edwin L. Dows, through his guardian, H. W. Gearey, applied to the court, and was granted an *ex parte* order permitting him to intervene in the action, and in pursuance of such permission he served his complaint in intervention. Thereafter, upon the affidavit of plaintiff's counsel, an order was obtained directing the said intervener to show cause

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why the order permitting him to intervene should not be vacated and set aside, and his complaint stricken from the case. The plaintiff's motion was denied, and this appeal is taken from the order denying the same. The plaintiff's complaint alleges that the defendant has failed to comply with the terms of her contract of sale, and, among other things, that she failed to turn over to the plaintiff portions of the annual crop, as agreed in said contract, and also to pay certain taxes assessed against the premises, and prays for judgment in the sum of $1,229.57, and that a decree be entered to the effect that if that sum, or such sum as shall be found to be due by the court, with interest thereon, shall not be paid within 30 days after the date of the decree, all the right and interest of the defendant in and to said land under said contract shall terminate. It is not necessary to refer to the allegations of the answer, further than to say that it places all of the allegations in the complaint in issue. The complaint in intervention, and upon which the order of intervention was made, alleges that on the 1st day of June, 1892, the intervener purchased the premises in question from the estate of Charles M. Reed, deceased, "and that he immediately took possession of, and ever since and now is in possession of, said land"; that thereafter, on the 3d day of September, 1897, he executed and delivered to one William McDonald a quitclaim deed to said premises to secure an indebtedness of $356; that thereafter, and on the 7th day of January, 1898, for the purpose of procuring money to pay his indebtedness to McDonald, he borrowed $500 from the plaintiff, Kernahan Dickson, and gave his note therefor, and that as security for said note, and not otherwise, the said William McDonald and the intervener and his wife, Martha Dows, joined in a quitclaim deed to the plaintiff, which said deed was given for the purpose of security only; that thereafter, in the year 1899, the said intervener, with the approval of the county court of Cass county and of his guardian, entered into a contract with the plaintiff whereby the intervener procured a further sum of money for the purpose of paying the balance due upon the price of the land, and to redeem certain personal property which had been taken from him upon chattel mortgages; that the plaintiff then agreed, as soon as the title was received for the Reed estate, to enter into a contract with the intervener to convey the premises to him upon a repayment of the sum of $4,160 and interest, which said sum was to be paid by delivering to the plaintiff all of the proceeds of one-half of the annual crop until said debt and interest was fully paid; "that the said Edwin L. Dows has at all times remained in possession of said premises, and is now in possessiion of the same"; that the plaintiff has refused to execute said contract, and that he has contracted to convey the premises to the defendant, Elizabeth M. Dows, "to the damage of this intervener in the sum of $7,000"; that said premises are of the value of $7,000. The prayer of the intervener is that the court shall decree that the several deeds above referred to are mortgages securing to the plaintiff the payment of

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$4,160, with 7 per cent. interest thereon from and after the 20th day of January, 1900, and that the court shall adjudge that, upon the payment by the intervener of the amount found to be due, the plaintiff reconvey said premises to the intervener; that the court further order that, if the intervener shall not pay the amount so adjudged within 30 days from the rendition of final judgment, a sale of the premises shall be made for the purpose of raising the amount found to be due to the plaintiff.

The sole question to be determined upon this appeal is whether the complaint of the intervener disclosed that he had such an interest in the matter in litigation in this action as would entitle him to intervene against the plaintiff's objection. We are clear that the complaint in intervention does not disclose that he has the requisite interest. The entire source of the intervener's alleged right to intervene is found in section 5239, Rev. Codes, which, so far as material, reads as follows: "Any person may before the trial intervene in any action or proceeding, who has an interest in the matter in litigation in the success of either party, or an interest against both. * * *" What the interest must be in order to authorize an intervention under this section has been repeatedly pointed out, in numerous cases. In *Smith* v. *Gale*, 144 U. S. 509, 12 Sup. Ct. 674, 36 L. Ed. 521, the court, in referring to this particular section, said: "These provisions of the Dakota Code above cited are found in the Codes of several of the states, and appear to have been originally adopted from Louisiana, wherein it is held by the supreme court, interpreting a similar section, that the interest which entitles a party to intervene must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties. *Gasquet* v. *Johnson*, 1 La. 431. In *Horn* v. *Water Co.*, 13 Cal. 62, 73 Am. Dec. 569, the supreme court of California had occasion to construe a similar provision of the Code of that state, and held (speaking through Mr Justice Field, now a member of this court) that 'the interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. * * *'" The same construction was placed upon the section by this court in *Bray* v. *Booker*, 6 N. D. 526, 72 N. W. Rep. 933; also by the supreme court of Minnesota in *Lewis* v. *Harwood*, 28 Minn. 428, 10 N. W. Rep. 586, in which the cases from Louisiana and California are cited with approval. See, also, 17 Am. & Eng. Enc. Law (2d Ed.) 180. It is not claimed by the intervener, neither can he claim, that he has any interest in the contract involved in this action. He is an entire stranger to it, and does not claim or pretend to be interested in it in any way whatever. Whatever rights he may have as against the plaintiff, or in the land, can in no way be affected by any judgment rendered in the action. His rights in

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the land, such as they are, are paramount both to the rights of the plaintiff and of the defendant. His complaint states that he has been in the possession of the premises ever since their purchase, in 1892. His possession amounted to contsructive notice of his right in the premises. *O'Toole* v. *Omlie*, 8 N. D. 444, 79 N. W. Rep. 849; Webb, Record Title, § 228, and cases cited. It is apparent that if the plaintiff should succeed in this action, and procure a cancellation of the contract, the intervener would not be prejudiced in asserting his cause of action; and it is equally clear that, if the defendant should prevail, he would not be prejudiced, because the defendant had constructive notice of his rights when she entered into the contract. On the other hand, the intervener discloses no right in the contract in litigation, and it further appears that he will neither gain nor lose as a result of any judgment which may be rendered in the action. The complaint in intervention invites the court to enter upon a judicial investigation of a cause of action in no way connected with the plaintiff's cause of action, and that, too, when the intervener's cause of action will remain entirely unaffected by a judgment to be rendered herein, whether it be for the plaintiff or for the defendant. The plaintiff insists upon trying the issues involved in the action unincumbered with issues which are entirely foreign to it. This he has a right to do, and the trial court erred in refusing to strike out the intervener's complaint.

The order appealed from will be reversed, and the district court is directed to enter an order striking out the intervener's complaint. All concur.

(92 N. W. Rep. 798.)

KATIE A. LITTLE *vs.* STEPHEN BRAUN.

Deed Absolute in Form—When a Mortgage.

Action to have a deed of warranty, which is absolute in form, adjudged to be a mortgage in effect, and to redeem from the same as a mortgage. The complaint alleges, in substance, that the defendant loaned the plaintiff the sum of $302 and that to secure such loan it was agreed that plaintiff should execute and deliver the deed of warranty in question, and that such deed was executed and delivered with the express agreement that, as between the parties thereto, it should operate as a mortgage to secure the loan. The complaint further avers that in making the loan and in entering into said agreements the defendant was represented by one M. A. Wipperman as defendant's agent. Evidence examined, and *held* that plaintiff and defendant did not, at any time, or in any manner, agree to accept the deed in question as a mortgage to secure the alleged loan, and that no such loan was ever made in fact.

Agreement by Agent.

Held, further, under the evidence, that said M. A. Wipperman did not, at any time in question, act in the premises as the agent of

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the defendant; nor did he, as such agent, agree to any loan to plaintiff, nor did he ever agree, in behalf of the defendant, that the deed should operate as a mortgage.

Evidence—Intention of Parties—Parol Defeasance.

Held, further, under the evidence, that the deed, when delivered, was intended to operate as a deed absolute, and that the evidence to show a parol defeasance falls short of that high degree of proof required by an established rule of evidence in this class of cases. Jasper v. Hazen, 4 N. D. 1, 58 N. W. Rep. 454, 23 L. R. A. 58, followed and applied.

Appeal from District Court, Richland County; *Fisk*, J.

Action by Katie A. Little against Stephen Braun. Judgment for plaintiff. Defendant appeals. Reversed.

J. A. Dwyer and *Charles E. Wolfe*, for appellant.

Freerks & Bessie, for respondent.

WALLIN, C. J. In this action the plaintiff is seeking to have a deed of conveyance, which is absolute in form, adjudged to be a mortgage. It is conceded that on April 18, 1898, the plaintiff was the owner of a quarter section of land in Richland county; that on said date the plaintiff (joining therein with J. H. Little, her husband) executed a deed of conveyance of said land, in which the defendant was named as grantee, and which deed was in the usual form of a deed of warranty, and purported to convey the land to the defendant in fee simple. Said deed was on said date delivered to one M. A. Wipperman by the plaintiff, with the intent that the same should be delivered to the defendant, and the same was delivered to defendant, and subsequently, and on the 21st day of April, 1898, the deed was filed for record, and was thereafter duly recorded. The complaint alleges, in effect, that the parties to the deed intended that the same should operate as a mortgage, and that it was given and received as security for a loan of $302, which loan, it is alleged, was made by the defendant to the plaintiff, and that such loan was the sole consideration for the deed. Plaintiff further alleges that at the time of the delivery of the deed it was expressly agreed between the parties to the deed that the defendant would reconvey the premises to the plaintiff upon payment of said sum of $302. The complaint also states that prior to the commencement of this action the plaintiff offered to pay the defendant the "amount of said loan," and that defendant refused to accept the same and claimed to be the owner of the land. Plaintiff, as relief, demands that the defendant be compelled to accept the amount due on the loan, and to reconvey the land to the plaintiff. The defendant, by his answer to the complaint, in effect denies that the deed was intended to be a mortgage, and denies making the alleged loan, and alleges that the defendant purchased the land of the plaintiff for a consideration of $350, and that said defendant acquired an absolute title to said land by the deed, subject only to a first mortgage of $530 to the state of North Dakota.

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It is conceded that a prior mortgage on the land had been foreclosed, and the land sold at foreclosure sale, prior to the execution of the deed in question, and at the date of the execution and delivery of the deed only a few days remained within which the land could be redeemed from the foreclosure sale. It is further conceded that a large part of the land was under cultivation, and that the plaintiff and her husband had, in the fall of 1897, at considerable expense, plowed the cultivated land, and that when the deed was made the land was in condition to be seeded, and that it was in fact soon after seeded by the plaintiff, and the plaintiff, in the year 1898, raised a valuable crop of wheat on said land. The undisputed evidence shows that the plaintiff's husband was much involved in debt, and that neither plaintiff nor her husband had any means or resources outside of the land in question, which could be made available in redeeming the land from said foreclosure sale. It appears that it required something over $900 to redeem the land. The evidence shows that for some time prior to the execution of the deed plaintiff's husband, acting for plaintiff, had been making efforts to raise the sum needed for the redemption of the land, and that, aided by Wipperman and others, he had succeeded in negotiating a loan from the state of the sum of $530, which amount was secured by a first mortgage upon the land in question: But the sum of $530 was not enough to enable the plaintiff to redeem from the foreclosure sale, and hence the plaintiff, represented by her husband, who called to his assistance said M. A. Wipperman, applied to several persons for an additional loan, to be secured by a second mortgage upon the land. But the applications for such additional loan were severally and in all cases refused, and such refusal was placed upon the ground that parties who had money to loan did not regard the security offered as adequate, and hence refused to make such additional loan on the security offered. It was in this conjunction that the defendant was applied to by M. A. Wipperman for an additional loan to plaintiff of $350, to be secured by a second mortgage upon the land. At the time the application for a loan was made no one was present except Wipperman, representing the plaintiff, and the defendant and they alone have testified as to what was said and done in the premises. Their testimony is, however, entirely harmonious, and it stands in this record uncontradicted. Mr. Wipperman, after testifying to the unsuccessful efforts which were made to secure the additional loan from others, said, referring to the defendant, as follows: "I went to Steve Braun about the first time Mr. Little was in, and Mr. Braun said, 'No; with that amount of money against it, he wouldn't make a second loan'; and I told Mr. Little so. 'Well,' he said, 'if it wasn't for the plowing that I done on the land, I would simply let it go by default, and let the sheriff's deed be issued.' I went up to Mr. Braun again, and asked him if Mr. Little and Mrs. Little would deed to him if he would furnish that money. I didn't say that Mrs. Little said so. I asked Mr.

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Braun if they would deed to him if he was willing to furnish the money. He was not anxious to do that. He said he considered the land in a sandy region. I afterwards got Mr. Braun to take a deed with the understanding Braun was to furnish the money, provided Mr. & Mrs. Little would give a deed." Refetring to the crop expected to be raised that year, Wipperman testified, in substance, that it was agreed between himself and Braun that plaintiff should have the crop. Mr. Wipperman was asked whether there was any talk between himself and the defendant about the transaction being a loan, or about paying the money back to defendant. To this he answered, "There was not." Again, this question was asked: "Q. Any understanding between you and Mr. Braun that any note should be given or any rate of interest fixed? A. There was not." Mr. Braun testified as follows: "Q. What conversation did you have with Mr. Wipperman relative to the furnishing this sum of money? A. Well, he first wanted a loan as a second mortmortgage, but I told him that I would not consider it at all. Later on he came to me and says: 'Will you take a deed for this land and assume the mortgage?' Q. What mortgage was this? A. That was the state loan,—the $530 mortgage to the state. I considered it, and I told him later on I would take it on a deed." Defendant further testified that he did not see the plaintiff or her husband before the deed was executed and delivered to him; that when Mr. Wipperman delivered the deed he paid over $350 to Wipperman; that there was no understanding or agreement between himself and Wipperman that the deed should operate as a mortgage, or that he (Braun) would reconvey the land to the plaintiff at any time upon repayment of the sum paid over to Wipperman. When asked what reason, if any, he gave to Wipperman for refusing the loan, he testified, "I simply said that I did not want anything to do with a second mortgage of any kind."

It is conceded that, after the arrangement between defendant and Wipperman was made, the deed in question was executed by the Littles, and that the same was delivered to Wipperman by the Littles, knowing that the same was to be turned over to the defendant, and the deed was in, fact promptly delivered to defendant by Wipperman, and at the same time the defendant paid to Wipperman the sum of $350, which amount was in fact used by Wipperman in redeeming the land from the foreclosure sale. No claim is made that any note was executed for the $350, nor that any time was ever agreed upon or mentioned at which the money was to be repaid to defendant. Nor is any claim made that any rate of interest was ever agreed upon or mentioned by any one as compensation for the use of the $350. In our judgment, the only material conflict in the evidence relates to what was said as between the plaintiff and her husband on the one side and M. A. Wipperman on the other, at the time the deed was executed and delivered to Wipperman by the plaintiff and her husband. But as to this transaction there is a subtsantial conflict. It

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appears that, after the defendant had acceded to Wipperman's proposition to accept a deed of conveyance of the land and advance $350 for the purpose of redeeming the land (provided the Littles were willing to execute and deliver a deed), Wipperman filled out a deed, and, taking the same with him, went to the residence of the Littles, where the deed was executed and delivered. At the time the deed was signed by plaintiff and her husband, there was present besides M. A. Wipperman one Jay Russell, and all of these parties testified as to what was said on the occasion. Mr. Wipperman testified as follows: "I went down to Mr. Little's, and I met Mr. Little outside, next to the barn, and this is the remark that he said to his wife: He says, 'Mama, Mr. Wipperman had a hard time to get the money to redeem that quarter of land, and he says we have got to deed it to Mr. Braun,—that tract of land,—but we are going to get that crop, and have the benefit of the plowing.'" Mr. Wipperman, referring to the deed, testified as follows: "After the matter was all taken, Mr. Little asked me that, if the crop of the same year would prove satisfactory, if Braun would deed back to him that piece of land. In answer I said, 'I don't know, but you know he was not very anxious to put any money into the land.' That is as near as I could give you the conversation." Wipperman testified emphatically that nothing was said by any one present when the deed was executed about obtaining a loan from Braun, or about giving a note or paying interest to Braun. Mr. Wipperman was asked: "At that time, Mr. Wipperman, was anything said about the deed, Exhibit A here, being a mortgage? A. There was not. Q. Was anything said about its being a trust deed? A. It was not." Wipperman further testified, in substance, that the plaintiff and her husband fully understood that they were conveying the land by warranty deed, and that Braun took absolute title to the land, subject to the state mortgage, but that the Littles reserved and were to have the crop grown on the land for the then current year, 1898. But, as opposed to this testimony, the plaintiff and her husband and Jay Russell were sworn as witnesses for the plaintiff. The plaintiff testified as follows: "I refused to sign the papers, because I understood, before he came out there, that this was a second mortgage, and I objected to signing a deed; and he told me it was just the same thing, and had to be foreclosed, before anybody could get possession of the ground; it was just the same as a second mortgage. And he said he had to have it that way in order to get the money, because there was not very much time left to get the money, and he couldn't go any place else because there was not any more time, and that Braun insisted upon having it that way. It was just the same as a second mortgage, so far as I was concerned." This witness was asked: "State what particular thing he called this deed. A. Second mortgage. Q. Did he use the words 'trust deed'? A. Yes, he told me trust deed was just the same as a second mortgage." Plaintiff further testified: "He said,

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'This money can be paid back any time. Mr. Braun will be only too willing to get this money;'" and further testified, referring to Mr. Wipperman's agency in the premises: "My husband—— I understood he was acting for my husband and myself in making this loan. Q. But had you employed him as your agent in any way to sell your land? A. That was not talked of. I never had any intention of selling the land." Jay Russell testified, in substance, that Mrs. Little did not want to sign the deed, but was willing to sign a mortgage, and that Wipperman said the deed was the same thing, and that, if they paid back the money, they could have their land. Mr. Little's testimony corroborated that of his wife as to what was said by Wipperman as to the nature and operation of the deed,—that the deed was, in effect, a trust deed, and would operate as a mortgage. Little also testified that, acting for the plaintiff, he had called on Mr. Wipperman to assist in raising the money by a loan with which to redeem from the foreclosure sale. The land has been in plaintiff's possession at all times since the execution of the deed, but this possession, after the year 1898, was without the consent and against the wishes of the defendant. It appears that Braun paid the taxes on the land.

The evidence shows that about one year after the delivery of the deed Mr. Little saw defendant, and requested him to make a statement of the amount the defendant claimed to be due him on account of the deed transaction; Little assuming at this interview that the deed was to operate as a second mortgage. The defendant promptly informed Mr. Little that he (defendant) claimed the ownership of the land, and that he considered that he had no statement to make to Little. Mr. Little stated to defendant, in this interview, that the deed was "nothing but a trust deed," and during the interview the defendant said to Little, "If you can get your money here in thirty days, I will make agreeable arrangements with you." We can find nothing in this interview, as disclosed by the evidence, which is significant, and certainly nothing at all decisive to the rights of the parties. Long prior thereto their respective rights and relations in this matter had become fixed. At the interview Braun claimed that he was the owner of the land, while Little, on the contrary, insisted that the deed under which Braun claimed title was "only a trust deed." True, Braun said to Little, during the talk, "If you can get your money here in thirty days, I will make agreeable arrangements with you." But this language certainly does not amount to a concession of plaintiff's ownership. What was meant by the phrase "agreeable arrangements" does not clearly appear, but this language, while ambiguous, is not at all inconsistent with Braun's absolute ownership of the land, which ownership Braun distinctly asserted at the same interview. We cannot, therefore, attach much weight to this feature of the evidence; nor can we see that its tendency was to impeach the testimony of Braun, or to show that Braun at that time thought that he was not the absolute owner of the land. He cer-

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tainly then and there asserted his ownership, and did so in clear and unambiguous language.

Counsel on both sides, in presenting their views to this court, have put much stress upon the matter of M. A. Wipperman's agency. Counsel agree—and must do so under the evidence—that Wipperman did not act in his own behalf, but, on the contrary, acted at all times in question in a representative capacity. Counsel, however, differ widely as to the extent and character of his agency, and especially differ upon the question of whose agent he was at the time the deed arrangement was made with the defendant and when the deed was executed and delivered by the plaintiff. We quite agree with counsel that the matter of Wipperman's agency is a factor of prime importance in the solution of the legal problem presented. It is undisputed that Wipperman acted for the plaintiff, to some degree, at least, in obtaining the loan of $530 from the state; and the plaintiff's own evidence, as well as that of Wipperman, conclusively shows that Wipperman was also authorized to represent the plaintiff in soliciting an additional loan as a means of meeting the exigency presented by the foreclosure sale. It distinctly appears, and the fact is not denied, that with the knowledge of the plaintiff's husband, who also acted for plaintiff, Wipperman applied to divers parties, among them the defendant, for such additional loan; and, further, that plaintiff's husband was informed of the fact that the defendant, as well as others applied to for a loan, had refused to make an additional loan on the security offered by the plaintiff, viz., upon a second mortgage. This evidence shows, and the fact is conceded, that in all things done or attempted by Wipperman about the matter of securing a loan for plaintiff's benefit, Wipperman was the duly authorized agent of the plaintiff, and acted as such. That he acted in good faith in all that he did in his efforts to negotiate a loan cannot be questioned under the testimony; nor is there an allegation in the complaint to the effect that either Wipperman or the defendant acted fraudulently in procuring the execution of the deed. The complaint is framed upon the sole theory that the defendant agreed with plaintiff to make a loan to plaintiff of the sum of $302, and that such agreement was made by the defendant through M. A. Wipperman, it being distinctly alleged that Wipperman was defendant's agent in making such agreement for a loan and in procuring the execution of the deed to secure the same. It therefore is a matter of the first importance to ascertain from the evidence who it was that Wipperman represented when the arrangement was made with defendant for the execution of an absolute deed, and also at the time the deed was executed and delivered. In this investigation we start with the fact that there is no evidence in the record of any express authority from the plaintiff or from her husband giving Wipperman a right to sell the land, or to offer the same for sale. On the contrary, the evidence tends to show that the first suggestion of an absolute sale of the land came from Wipperman himself. Con-

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cerning this point we have the uncontradicted testimony of Wipperman. After testifying that defendant refused to make a loan on the security offered, and that he informed plaintiff's husband of such refusal, and after stating that plaintiff's husband said, "If it wasn't for the plowing that he had done on the land, he would let the land go by default, and let the sheriff's deed issue," Wipperman testified as follows: "I went up to Mr. Braun again, and asked him, if Mr. Little and Mrs. Little would deed to him, if he would furnish that money. I didn't say that Mrs. Little said so. I asked Mr. Braun, if they would deed to him, if he was willing to furnish the money. I afterwards got Mr. Braun to take a deed with the understanding Braun was to furnish the money provided Mr. and Mrs. Little would give a deed." Braun's testimony is also clear to the point that Wipperman first broached the suggestion that an absolute deed be obtained from the Littles. So far as appears, the suggestion was made before the Littles had been consulted, and the entire arrangement between defendant and Wipperman as to obtaining the deed was wholly conditional, and depended upon whether the Littles were willing to dispose of the land, and transfer the title by a deed. The defendant, while on the stand, was repeatedly asked whether, in his negotiations with Wipperman relating to the deed, the latter assumed or pretended that he was representing him (the defendant) in the matter. To these questions apparently contradictory answers were made. He twice answered, in effect, that Wipperman did not assume or pretend to represent him, the defendant. Once he answered that Wipperman was acting for him in the matter. This testimony wound up as follows: "Q. He was to get this deed, and you were to pay the money? A. Yes, that is all there is of it." This testimony, standing alone, as we view it, leaves the question of agency unsolved, and affords little or no aid to the court in reaching a conclusion upon the question. Hence a solution must be sought in the facts and evidence elsewhere disclosed by the record. We have perused the evidence with great care, and have been unable to find a scrap of evidence in this record tending to show that the defendant ever at any time gave Wipperman any instructions or directions to procure any deed from the plaintiff, or at any time ever requested him to obtain the deed in question, or to obtain any deed from the plaintiff. On the contrary, the evidence is undisputed that defendant at all times refused to advance the money necessary to redeem the land as a loan, or to have anything whatever to do with any second mortgage; and yet, if plaintiff's theory of the facts is accepted as correct, the defendant did agree to make a loan, and to do so upon an instrument which, under the law and the existing circumstances, would be a second mortgage, and nothing else or better than that. But, as we have said, there is no evidence tending to show that Braun ever agreed to loan the plaintiff any money on any terms whatever.

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If the court could, without evidence of such fact, indulge the theory that Wipperman, in procuring the execution of the deed, acted under instructions from the defendant, and as defendant's agent, it would then become necessary to accept the consequences of placing Wipperman in that relation to the defendant. It would necessarily follow from the supposed agency that all which Wipperman said and did within the scope of such agency was done pursuant to the defendant's instructions, and upon this supposition the conclusion could not be escaped that defendant, after refusing to make the loan, actually loaned $350 to plaintiff, not only upon a second mortgage, but did so without taking a note, without any agreement as to a rate of interest, and with no agreement on plaintiff's part to pay the debt at any particular time. All this will logically follow and cannot be avoided if the court shall accept the plaintiff's theory that the defendant, acting through Wipperman, agreed to make the loan and accept the deed as an instrument of security. There is no claim that Wipperman exceeded or violated any of defendant's instructions in the matter of procuring the execution of the deed, nor do counsel for respondent, in their brief or otherwise, broach any such theory. But, as we view the facts disclosed by the record, there was nothing wrong or unnatural involved in the suggestion which was made to defendant by Wipperman to the effect that defendant should purchase the land upon the terms suggested. At the time the suggestion was broached by Wipperman, he well knew that a crisis had been reached in plaintiff's financial affairs. She had, without success, faithfully sought a loan, to be secured by a second mortgage, and her agent, Wipperman, and her husband, could do no more for her in that direction; and hence the plaintiff was confronted by the alternative of losing the use of the land for the year 1898, and also sacrificing all that it had cost to prepare the land for seeding. There was very little time in which to act. In this emergency, Wipperman—we think quite naturally and properly—conceived the idea that a sale outright would be far better for the plaintiff than to permit a sheriff's deed to issue under the foreclosure. If the sheriff's deed issued, the plaintiff would be evicted from the land, and, as a result, would lose the use of the land for the crop of 1898, and also lose all that had been invested in preparing the land for such crop. In this state of plaintiff's affairs, we think a proposition to sell was a reasonable and natural one, coming, as it did, from an agent of the plaintiff, who had long tried without success to negotiate a loan, and thereby tide over the emergency. Having found a purchaser willing to buy, and who offered to buy on certain terms, which included an offer to allow plaintiff to crop the land for the current year, it was a natural thing to do at least to submit such offer to the plaintiff and her husband; and, in our judgment, it would have been an act of folly if the offer had been refused by the plaintiff, under the circumstances disclosed by the evidence; and we have reached the conclusion that the offer was

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accepted, and that the deed was signed and delivered as a deed of absolute conveyance, and was not made as a security for any loan. We are fully aware of the fact that the plaintiff and her witnesses testify that Wipperman represented that the deed was a trust deed, and that it was to operate as a mortgage; but this testimony is most ephatically denied by Wipperman, and it is also confronted by the stubborn facts which inhere in the transaction, and to which we have already referred at length. The deed itself, by its terms, testifies strongly against the notion that it was intended to operate as a mortgage, and to this must be adder the established fact that no loan was ever agreed to be made, and the further significant fact that none of the ordinary incidents of a loan accompanied the giving of the deed. If Wipperman, as the complaint charges, acted as the defendant's agent in procuring the deed, and in doing so (in direct violation of the arrangements made between the defendant and himself) proceeded to accept the deed as a mortgage he was not only guilty of an act of gross treachery, but to this he added the crime of perjury, and on this theory all this he has done without any apparent motive other than that of sheer diabolism. There is no evidence in the record tending to show that Wipperman has any interest in the result of this litigation, and he testified that he has no interest whatever in the litigation. But upon the record this court has reached the conclusion that Wipperman did not represent the defendant in procuring the execution and delivery of the deed, and we are compelled to go further, and hold that Wipperman, in procuring the execution of the deed, acted as the plaintiff's agent. It is conceded that he was representing the plaintiff in all the efforts which he put forth in the way of soliciting a loan upon a mortgage as a means of redeeming the land, and it distinctly and affirmatively appears from all the plaintiff's evidence that Wipperman at least professedly acted as her agent in all that he stated to the plaintiff when he presented the deed to her for execution. He had been previously clothed with authority to solicit a loan for the plaintiff's use, and when the deed was presented for execution the plaintiff testified to the effect that Wipperman said that the deed was to be given and received as a mortgage to secure a loan to be made by the defendant to plaintiff, and that defendant would not make the loan unless it was made upon a deed as security. It is further true that plaintiff and her witnesses testified to the effect that Wipperman assured the plaintiff that the defendant would reconvey the land to the plaintiff upon payment of the loan. Upon these assurances the plaintiff, according to her evidence, delivered the deed as a mortgage to secure a loan, and did so with intent that the same should be delivered by Wipperman to the defendant, and the deed was delivered by Wipperman to the defendant. Upon the plaintiff's evidence, therefore, it is manifestly true that Wipperman was at all times the plaintiff's agent. It is also true that upon the plaintiff's evidence Wipperman, in obtaining the deed, was guilty of a gross deceit and fraud; but this concession does not militate in the least

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against the fact that such supposed fraud was the act of plaintiff's own agent, and therefore a fraud, for which the defendant cannot be held responsible, either in law of in good morals. The evidence makes it entirely clear that the defendant is personally guilty of no deceit or fraud whatever, and none is charged against him in the complaint. He bargained for an absolute deed of conveyance, and received such a deed, and did so, so far as appears, innocently, and in the usual course of business. Our conclusion is that, in any event, and however viewed, the testimony in this case falls far short of that high degree of proof which is required in cases where a party seeks by oral testimony to establish a defeasance, and to impeach and destroy a deed or other solemn instrument which has been deliberately reduced to writing and signed by the parties who seek its destruction. The rule as to the degree of proof in such case is voiced in an opinion of this court, formulated by BARTHOLOMEW, J., as follows: "Courts have with great uniformity in this class of cases required the proof that should destroy the recitals in a solemn instrument to be clear, specific, satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt." See *Jasper* v. *Hazen*, 4 N. D. 1, 58 N. W. Rep. 454, 23 L. R. A. 58. This case has been cited with approval in the following case, *McGuin* v. *Lee*, 10 N. D. 161, 86 N. W. Rep. 714, and see the recent case of *Sargent* v. *Cooley* (decided this term), 94 N. W. Rep. 576.

The conclusion we have reached necessitates an order reversing the judgment of the trial court, and such order will be entered, together with an order directing a judgment to be entered in the district court denying the relief demanded in the complaint, quieting the title to the premises in the defendant, and also awarding the possession of the land to the defendant. All the judges concurring.

(92 N. W. Rep. 800.)

STANDARD SEWING MACHINE CO. *vs.* JEREMIAH R. CHURCH, *et al.*

Guaranty—Test of.

Construing section 4630, Rev. Codes, which provides that "a mere offer to guarantee is not binding until notice of acceptance is communicated by the guarantee to the guarantor, but an absolute guaranty is binding upon the guarantor without notice of acceptance," it is *held* that the test as to whether a guaranty amounts to an absolute guaranty, or merely an offer of guaranty, is whether there has been or has not been that mutual assent or meeting of minds necessary to the existence of a contract. If there has not been such assent, the instrument amounts merely to an offer of guaranty, and becomes binding upon the guarantors only when notice of acceptance is communicated as required by the statute.

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Notice of Acceptance Necessary.

It is *held* that the instrument sued upon in this case was only an offer of guaranty, and that, inasmuch as notice of acceptance was not given to the defendants, they are not liable thereon, and a verdict was properly directed in their favor.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by the Standard Sewing Machine Company against Jeremiah R. Church and George Salisbury. Judgment for defendants, and plaintiff appeals. Affirmed.

John P. Galbraith and *Bosard & Bosard*, for appellant.

Frank B. Feetham, for respondents.

YOUNG, J. The plaintiff brings this action upon a written instrument purporting to be an undertaking of guaranty, signed by the defendants, and by which they guaranty to plaintiff the payment of the price and value of such sewing machines and articles connected therewith as the plaintiff might furnish to one J. N. Edmunds upon credit, limiting their liability, however, to the sum of $1,000. The case was tried to a jury. After plaintiff had rested his case, counsel for defendants made a motion for a directed verdict upon the ground "that the plaintiff had not proved facts sufficient to constitute a cause of action as against the defendants." This motion was granted, and judgment was entered dismissing the action and for costs. Plaintiff has appealed from the judgment, and in a statement of case duly settled has specified the ruling upon the above motion as error.

The instrument sued upon is as follows: "To the Standard Sewing Machine Company: * * * I, J. R. Church, George Salisbury, of Grand Forks, in the county of Grand Forks, North Dakota, Eddie Reddy, Grand Forks, in consideration of your supplying J. N. Edmunds, of Grand Forks, in the county of Grand Forks, in the state of North Dakota, with sewing machines and articles connected therewith on credit, do hereby guarantee the payment of the price and value of said goods at maturity to an amount not to exceed one thousand (1,000) dollars, whether the same be due on open account or by note or acceptance or otherwise, and you are hereby authorized to grant such delay as you may see fit, for the payment of any such sum which may be due you at any time,—this agreement to be held as a continuing security in your favor, and to cover any and all renewals of the debts, notes, or acceptances which may from time to time be made, and any interest or cost due thereon, and any balance which may at any time be due from said J. N. Edmunds to you; and, should you at any time institute legal proceedings under this guarantee, I hereby waive any right or claim to demand or receive security for costs in such proceedings. Nov. 5th, 1891. J. R. Church. George Salisbury."

Evidence was introduced showing the execution of the instrument by defendants, and that plaintiff had thereafter consigned a large number of sewing machines to Edmunds to be sold by him

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on commission, and that the latter had not accounted for the same. Counsel for the respective parties then stipulated in open court the circumstances under which the above instrument was executed. It was stipulated that it "was obtained by the J. N. Edmunds therein named from the sureties, and by him afterwards delivered to the plaintiff; that neither the plaintiff nor any of its agents requested the defendants to sign the instrument, nor were they present when the same was signed and delivered to the said Edmunds; and neither of the sureties were present when it was delivered to the plaintiff; and that the sureties were never notified by the plaintiff of its acceptance and of the dependence of the plaintiff upon the undertaking."

It is agreed by counsel for both parties that the controlling question on this appeal is whether the instrument sued upon is an absolute guaranty or merely an offer of guaranty. If it is an absolute guaranty, the further question would arise whether any liability arose thereunder upon a mere consignment of goods to Edmunds to be sold by him upon commission, a point upon which we express no opinion. If it is merely an offer of guaranty it will be conceded that it never became binding upon the defendants, for the reason that no notice of the plaintiff's acceptance of the guaranty was ever communicated to the defendants. This fact is stipulated. Such notice is necessary to the validity of an offer of guaranty under the provisions of section 4630, Rev. Codes, which reads as follows: "A mere offer to guarantee is not binding until notice of its acceptance is communicated by the guarantee to the guarantor, but an absolute guaranty is binding upon the guarantor without notice of acceptance." The reason for requiring notice of acceptance of an offer of guaranty to be communicated by the guarantee to the guarantor—and this requirement of the statute is also the well-settled doctrine of the courts—is that without acceptance and notice of acceptance there is not that mutual consent necessary to the existence of a contract, or, in other words, there is no contract of guaranty. See 14 Am. & Eng. Enc. Law, 1146, and cases cited in note 8; also 25 Am. Digest (Century Ed.) p. 26, and cases cited § 9, and 1 Brandt, Sur. § 186. See, also, *Adams* v. *Jones*, 9 L. Ed. 1058.

The true test, we think, in determining whether a guaranty is in fact an offer of guaranty or an absolute guaranty, is whether there is this mutual assent. In *Machine Co.* v. *Richards*, 115 U. S. 524, 6 Sup. Ct. 173, 26 L. Ed. 480,—and this is the leading case upon this subject,—it was held that "a guaranty signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, is, in legal effect, an offer or proposal on the part of the guarantor which requires an acceptance to complete the contract." Mr. Justice Gray, who wrote the opinion in that case, summarized the rule as follows: "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the

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request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

Applying these principles to the facts of this case as they are stipulated, we have no hesitation in reaching the conclusion that the instrument sued upon is a mere offer of guaranty, and that it never became a binding obligation upon the defendants because of plaintiff's failure to complete the same by communicating to the defendants a notice of its acceptance. The mutual assent or meeting of minds necessary to the existence of a completed contract was therefore wanting. As has been seen, it was not executed by the defendants at the plaintiff's request, or in the presence of its agents, and the instrument acknowledges the receipt of no consideration from the guarantee to the guarantors, and there was no contemporaneous acceptance of it. On the contrary, it is expressly stipulated that it was signed by the defendants without request from plaintiff or its agents, and that they were not present when it was delivered by the defendants to Edmunds, and that the defendants were not present when Edmunds delivered it to the plaintiff. It amounted, then, merely to an offer or proposal which the plaintiff might accept or reject, at its option. If it desired to make the offer binding upon the defendants, it was not sufficient merely to accept and act upon it, but it was required under the statute to communicate to the defendants notice of its acceptance. This was not done. There was therefore no mutual assent, and consequently no contract and no liability.

The verdict was properly directed, and the judgment will be affirmed. All concur.

(92 N. W. Rep. 805.)

RED RIVER VALLEY NATIONAL BANK OF FARGO *vs.* JOHN MONSON.

Evidence—Objection Properly Sustained.

On the trial of an action which involved the issue whether a promissory note was given for a valuable consideration, or was given as an accommodation note, it became a material question as to what transpired between the parties at the time the note was executed and an arrangement made, under which certain notes

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endorsed by Fuller & Co., and deposited with the bank as collateral security, were turned over to a collection agency for collection. While testifying on that issue, the following question was asked a witness for the plaintiff, and an objection thereto sustained, viz: "Did the bank exercise any ownership over those notes?" *Held*, that the objection was properly sustained, as it called for a conclusion, and not for a fact.

Objection Overruled—Held Error.

Questions were propounded to the defendant as to whether he had ever received these notes, or proceeds of these notes, or had anything to do with them, and an objection thereto overruled. *Held* not error.

Harmless Error.

Held, further, that error cannot be predicated on a ruling sustaining an objection to a question when the answer called for is thereafter fully given by the witness.

Verdict Sustained by Evidence.

The evidence is considered, and it is *held* that the verdict was sustained by competent evidence.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the Red River Valley National Bank of Fargo against John Monson. Judgment for defendant, and plaintiff appeals. Affirmed.

David R. Pierce and *Newton & Smith*, for appellant.

Newman, Spalding & Stambaugh, for respondent.

MORGAN, J. This action is brought to recover a judgment on a promissory note executed by the defendant as administrator to the plaintiff bank on November 28, 1899, for the sum of $213.64. The answer admits the execution of the note, but alleges that the same was given as an accommodation note, and was without consideration, and in the answer the following facts are pleaded: That in 1893 one Charles M. Fuller died testate, and in his will nominated the defendant as his executor, and he was duly appointed as such by the county court of Cass county; that at the time of his death said Fuller was indebted to the plaintiff bank on a promissory note given by him to said bank, and that such note was held and owned by said bank on November 28, 1899; that on said day the plaintiff requested the defendant, as such executor, to execute to it a promissory note for the amount due it from the estate of the said Fuller for the purpose of enabling the plaintiff to carry said claim, so that it would not appear upon its books and statements to be overdue. The case was tried before a jury. The verdict rendered was in favor of the defendant. A motion for a new trial was made, based on a notice of intention, a statement of the case settled, and the motion for a new trial denied. Judgment was entered on the verdict, from which this appeal has been taken.

The specifications of error relate to rulings on the admission and

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rejection of evidence, and to the insufficiency of the evidence to sustain the verdict. A summary of the evidence must now be given, as produced at the trial. In 1893 the firm of C. M. Fuller & Co. was indebted to the plaintiff by reason of having received credit at the bank on notes of third parties, indorsed by the firm, and deposited with the bank as collaterals to the credits. In 1893 Fuller died, and the other member of the firm thereafter became insolvent. The plaintiff was appointed executor of Fuller's estate, and as such had charge of the estate, and the same was administered in the county court. The fact that he was appointed executor and signed the note as administrator is unexplained, but entirely immaterial. In 1897 negotiations were had between the bank and this defendant in reference to the Fuller & Co. indebtedness to the bank on account of advances made by the bank on the notes left with it as collateral. These negotiations resulted in the giving of a note signed by Mr. Monson as administrator, and by Mr. Gaard, who was the surviving member of the firm of Fuller & Co. This note was given in 1897, and was renewed on November 28, 1899, by the giving of the note in suit, by Monson, as administrator. What transpired between the bank and Mr. Monson at the time of the giving of the note by Monson and Gaard is in conflict, and upon that transaction and the subsequent conduct of the parties depends the sufficiency or insufficiency of the evidence to justify the verdict.

It is claimed by the bank that the evidence shows that when the original note signed by defendant and Gaard was given the bank turned over to the defendant all the discounted notes and collateral notes held by it through transactions with Fuller & Co., and that the bank thereafter had no interest in the same except as collection agents for Monson. By Monson it is claimed: "Mr. R. S. Lewis came to me in the store, and he says: 'What are you going to do about those Fuller notes?' 'Well,' I told him, 'I don't know as I can do anything; they had the notes, and they ought to try to collect them.', 'Well,' he says, 'we ought to make some arrangement so that we would not have to carry that overdue paper.' I says, 'What arrangement can be made?" He says, 'You and Mr. Gaard had better give your note for it, so that we have something to show the bank examiner when he comes around, so there will be no overdue paper.' That was the first statement made. We gave the note,—it was not given there in the store. We went to the bank, and signed the note they made. We renewed the note from time to time, and it was finally separated. R. S. Lewis was at the time, I think, cashier of the bank. There was not at that time, nor has there been since, any agreement that the bank should not present this claim against the estate of Mr. Fuller for payment." This testimony is not directly contradicted, except to the extent that Mr. Lewis was not at that time the cashier of the bank. Mr. Lewis was not a witness at the trial. Mr. Monson further testified that the notes were never turned over to him, and that he never had pos-

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session of them, never saw them, and never received any of the proceeds of the notes, nor had anything to do with them; that he signed a receipt for those notes at the request of the bank, relying on their statements that it was necessary for him to do so to show his consent when they were turned over to the Standard Trust Company by the bank, for collection; that he did not understand that he ever assumed the debts of Fuller & Co. to the bank if the estate did not have money enough to pay it. There is testimony in the record directly contradicting this testimony of Monson. At the suggestion of the bank, and with the consent of Monson, these notes that had been discounted to the bank and indorsed by Monson & Co., and also the collateral notes, were turned over to the Standard Trust Company to be collected by it. The Standard Trust Company gave a receipt for the notes, reading as follows: "Received of John Monson, adm., from the hands of Red River Valley Nat. Bank, the notes listed below, for collection." As stated above, the giving of this receipt was explained, and Monson's version of the giving of it given at the trial. These disputed questions of fact were submitted to the jury under all the evidence, and they were directed to determine therefrom what the facts were in truth, and whether Mr. Monson gave the notes in suit as an accommodation to the bank, or whether it was for a consideration passing between him personally or as administrator and the bank. The testimony being in conflict on this issue, and having been submitted to the jury, and the jury having found for the defendant, we are convinced that the verdict must stand as amply sustained by competent testimony. We see no reason for disturbing the verdict on the ground of insufficient evidence.

We will now consider the assignments of error based on rulings upon the admission of testimony offered at the trial. Counsel for plaintiff asked Mr. Von Neida, president of the bank: "And from the time they were so turned over the bank had no further interest in these notes, did it?" The question was objected to for the reason that the paper shows for itself, and it calls for a conclusion. The objection was sustained. Immediately thereafter the witness testified as follows: "These notes enumerated in this receipt were embraced in those turned over to Mr. Monson at the time when he and Gaard gave the original note to the bank, and from the time when they were so turned over the bank ceased to have any interest in them, except as it sought to collect them for Mr. Monson." This was a complete answer to the question. Hence, if it had been an erroneous ruling, it would not have been prejudicial, as the evidence called for was placed before the jury.

The court sustained an objection to the following question: "Did the bank exercise any ownership over these notes?" The ground of the objection was that the question called for a conclusion, not a fact. The objection was well grounded. What are acts of ownership and what are not are more conclusions of law than questions

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of fact. It might well be that the witness would be sincere in stating that he had exercised no acts of ownership over the notes, when the jury, under proper instructions, might come to a different conclusion. The question called for an answer that involved the mere conclusion of the witness, and did not call for any fact. The question comes within the reasoning of *Olson* v. *O'Connor,* 9 N. D. 504, 84 N. W. Rep. 359, 81 Am. St. Rep. 595, and *Tetrault* v. *O'Connor,* 8 N. D. 15, 76 N. W. Rep. 225. In the former case this court said: "This case it not to be confounded with those where the answer of a witness does in fact involve the expression of an opinion or his conclusion or legal inferences. In such cases the objection urged would be good. * * * And the test always is whether the answer (question) calls for an opinion or a fact. The peculiar facts of each case must determine the rule to be applied."

The next assignments are based on plaintiff's objection to a question, and on its motion to strike out certain evidence, given by the defendant, which may be considered together, as involving the same point. The question was: "Did you ever receive any of the notes themselves, either from the bank, or from the Standard Trust Company, or from Mr. Jones?" The witness had previously stated that he never received any of the proceeds of the notes, and the motion was made to strike out such testimony. The objection to the question was that it was incompetent, irrelevant, and immaterial, and that the paper shows for itself that the Standard Trust Company receipted to Mr. Monson himself for the notes. In overruling the motion and objection there was no error. The defendant had explained under what circumstances the Standard Trust Company had receipted to him for the notes, and the paper being a receipt only, it was proper to allow an explanation in regard to it. The issue in the case was whether the defendant received any consideration on the note in suit. If he had received any consideration, he could not defeat recovery on the note. The question called for a fact material to the issue, and an answer was properly allowed. The answer was not necessarily conclusive of his liability, but had a bearing thereon. He might be liable on the note, although he had never received any of the notes or proceeds, as the question of liability might rest wholly on what transpired when the note was signed.

Finally, it is urged that error was committed when the court allowed the following question to be answered by the defendant, "Did you ever have anything to do with them?" referring to the collateral notes. The objection was made in the same language as that to the question last disposed of, and what is said on that assignment disposes of this one. The question called for an answer to a fact bearing on a material issue, and no error was committed in permitting the answer. This disposes of all the assignments urged.

The judgment is affirmed. All concur.

(92 N. W. Rep. 807.)

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STATE *vs.* WILLIAM BARRY.

Criminal Law—Insanity as Defense.

The appellant was charged with the crime of murder in the first degree, and to this charge entered a plea of not guilty. The defense of insanity was interposed, and at the trial a large amount of evidence was offered upon the question of appellant's sanity on the day of the homicide. One Mears, a nonexpert witness for the defense, testified, in substance, that he had known the appellant for some years, had transacted business with him, and had met him frequently; that he had seen appellant on the day of the homicide, and observed that he was talking, and walking about rubbing his hands, with his head down. The witness further testified, "I didn't notice anything peculiar or out of the ordinary in his appearance that day, more than I have stated, that he was rubbing his hands, and walking up and down." On this foundation the witness was asked whether he had formed an opinion as to the appellant's sanity or insanity on the day of the homicide. An objection was made to this question, which was sustained by the court. *Held*, that said ruling was not error.

Opinion of Layman as to Insanity—Rule.

Upon an issue of insanity a layman may be required to express an opinion as a witness, but before doing so the facts developed must show his competency to testify. His opinion must rest upon a basis of fact, and the rule is that a nonexpert will not be allowed to express an opinion affirming insanity unless the facts developed indicate insanity, to some extent at least. The facts testified to by Mears did not indicate insanity, and hence he was not competent to express an affirmative opinion as to appellant's insanity.

Opinion Evidence—Competency—Judicial Discretion.

Held, further, that no inflexible rule has been formulated by the courts which will exactly measure the amount of testimony required to show competency to give opinion evidence, and upon the preliminary question of competency the conclusion to be reached by the trial court is within the domain of sound judicial discretion, and such conclusion, therefore, will not be reversed on appeal except in cases of abuse.

Charge to Jury—Expression of Judge's Views as to Weight and Effect o Evidence Prejudicial Error.

At the trial the state offered testimony in support of the charge as embodied in the information, and a portion of such testimony consisted of certain statements made by the appellant to the witnesses in the nature of confessions, and to the effect that he (the appellant) had killed the deceased. The appellant offered no evidence contradicting the witnesses for the state upon any feature of the charge as alleged in the information. The only testimony offered by the appellant related to the defense of insanity. Upon this state of the evidence the trial court, in the course of its charge to the jury, instructed them as follows: "With regard to the evidence in this case, there is very little comment required from the court, except upon one question; the others being hardly matters of dispute. That the defendant struck Andrew Mallem with a knife is abundantly proved, if you believe the testimony of the state in this case. That the wound caused his death has been testified to by the sur-

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geons most competent to speak, and they are uncontradicted. That the homicide was committed with malice aforethought or premeditation, if the defendant was capable of criminal intent, the malice and premeditated design can hardly be gainsaid, if you will bear in mind what I have already stated, and if you believe the testimony of the state in this case; and in fact there is no denial made by the defendant of ever having committed the act. * * * Evidence has been submitted to you in this case by a number of witnesses showing that the defendant has admitted forming an idea to kill the deceased, and also that he did strike him on the neck with a knife, which wound was the cause of deceased's death; and the court instructs you as a matter of law that the admissions of the defendant are legal and competent evidence against him. Therefore, all these facts and admissions, if believed by you, come up to the full measure of proof required to establish what the law denominates 'premeditated design' and 'malice aforethought,' if the defendant was capable of forming an intent. And thus I apprehend that you will have little difficulty in reaching a conclusion as to all the elements that make up the crime charged in the information, unless it be one of 'sound memory and discretion,' as it is called, which is only another expression for a 'sound mind.' We now approach the serious and difficult question in the case." *Held*, that the language of the charge, as above quoted, gives clear expression to the views of the presiding judge upon the weight and effect of the evidence offered in behalf of the state, and hence the same is prejudicial error.

Charge—Prejudicial Parts not Cured.

In other protions of the charge the jury were instructed to the effect that the trial court desired to avoid giving expression to its views to the jury upon the weight of the evidence or upon the credibility of the testimony, and the jury was informed by the court that they were the exclusive judges of the credibility of the testimony and of the weight and effect of the evidence. *Held*, that such portions of the charge do not operate to cure the error involved in instructing the jury in the language of the charge which has been quoted.

Rule in Terr. v. O'Hare, 1 N. D. 30, Adhered to.

Held, further, construing statutes embraced in the Code of Criminal Procedure (sections 8176 and 8217, Rev. Codes 1899), that the common-law rule which prevails in some of the states and in the federal courts, permitting trial courts in charging juries to give expression to their views upon the credibility of testimony, or its weight or effect, has been abrogated by statute in this state. The rule promulgated in Territory v. O'Hare, 44 N. W. Rep. 1003, 1 N. D. 30, is adhered to, and *held* to be in force under the existing statutes.

Verdict of Acquittal Cannot be set Aside, when.

The plea of not guilty puts in issue every essential element of the offense charged, and, until this issue is determined, the courts of this state are inhibited, under the statute, from instructing the jury that any essential fact is established; and this is true in a case where no evidence is offered to disprove the fact. The jury has the right to disbelieve and wholly reject the testimony of any witness, whether he is contradicted or not; and when this is done wrongfully the court is powerless, in a criminal case, to set aside a verdict of acquittal.

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Refusal to Give Instructions—When Error.

A proper request for instructions was delivered to the trial court after the charge had been read to the jury, but before the jury retired for deliberation. The trial court refused to give the instruction to the jury, and based its refusal—First, upon the ground that the request was presented too late; and, second, upon the ground that the instruction has been substantially covered by the charge as given to the jury. *Held*, that it was error to refuse the request upon the ground that it was presented too late. Whether the request was covered by the charge is not considered in the opinion, and hence the question whether the refusal to give the request was prejudicial error is not determined.

Insanity as a Legal Defense not to be Disparaged.

As to the defense of insanity, the court charges as follows: "The defense of insanity has been so abused as to be brought into great discredit. It has been the last resort in cases of unquestionable guilt, and has been an excuse to juries for acquittal, when their own and the public sympathy have been with the accused, especially when the provocation to homicide has excused it according to public sentiment, but not according to law. For that reason it is viewed with suspicion and disfavor whenever public sentiment is hostile to the accused. Nevertheless, if insanity be established to a degree that has already in part and will hereafter be further explained, it is a perfect defense to the information for murder, and must be allowed due and full weight and consideration." *Held*, that said instruction to the jury is error. The defense of insanity is a legal defense, and hence it should not be disparaged, or placed under the ban of disapproval by the court.

Appeal from District Court, Cavalier County; *Kneeshaw*, J.

William Barry was convicted of murder, and appeals. Reversed.

Tracy R. Bangs, for appellant.

Clarence Mears had known Barry since 1892. Had business relations with him in 1898 and 1899. Saw him frequently since 1898, and had talked with him. Saw him on January 3rd, and recounted his observations to the jury. It was error to exclude his opinion as to defendant's sanity. *Bolling* v. *State*, 16 S. W. Rep. 658; *Jamieson* v. *Peo.*, 34 N. E. Rep. 486; *Peo.* v. *Sanford*, 43 Cal. 29; *Peo.* v. *Wredden*, 59 Cal. 392; *Peo.* v. *Lewis*, 22 Pac. Rep. 241. In his instruction the court read to the jury § 6814, Rev. Codes, describing persons incapable of crime, and omitted to read in that section Subd. 6 thereof, as follows: "Persons who commit an act or make an omission, otherwise criminal or punishable, without being conscious thereof." At the close of the case the court's attention was called to this omission by a request that he charge the jury in the following language: "If you find that the defendant was not conscious of the act which resulted in the death of Andrew Mallem, you must acquit the defendant." This request was refused because not presented in time, and as substantially covered by the general charge. § 6814, Rev. Codes. The court erred in charging the jury as a matter of law "that if you believe the evidence of the prosecution as to the killing, that the defendant is guilty of murder as charged in the in-

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formation or he is innocent of any crime." *Kearney* v. *Cooper,* 17 Pac. Rep. 782; *Peo.* v. *Webster,* 39 Hun. 398, 13 N. Y. Supp. 414. The charge should be free from intimating any opinion as to the weight of the evidence. *State* v. *Whitney,* 7 Ore. 386; *Benedict* v. *State,* 14 Wis. 424; *Snyder* v. *State,* 59 Ind. 105; *State* v. *Bidge,* 84 N. W. Rep. 518; *Peo.* v. *Lington,* 32 Hun. 461; *Peo.* v. *Cogwill,* 29 Pac. Rep. 228; *Stokes* v. *Peo.,* 53 N. Y. 164; *McKenna* v. *Peo.,* 81 N. Y. 360; *Rice* v. *State,* 3 Tex. App. 451; *Peo.* v. *Johnson,* 39 Pac. Rep. 622; 14 Cent. Dig. § 1732. The court erred in instructing the jury that "in this case there is very little comment required from the court except upon one question, the others being hardly matters of dispute. That the defendant struck Mallem is abundantly proved, if you believe the testimony of the state in this case. That the wound caused his death has been testified to by the surgeons most competent to speak, and they are uncontradicted." §§ 8176, 8217, Rev. Codes; *State* v. *Asbury,* 37 La. Ann. 124; 14 Cent. Dig. § 1731; *Peo. v. Dick,* 34 Cal. 663; *Peo.* v. *Roberts,* 55 Pac. Rep. 137; *State* v. *Lightfoot,* 78 N. W. Rep. 41; *State* v. *Whitney,* 7 Ore. 386; *Peo.* v. *Lee,* 15 Pac. Rep. 322; *State* v. *Porter,* 38 N. W. Rep. 514; *State* v. *Hecox,* 83 Mo. 531; *State* v .*Austin,* 80 N. W. Rep. 303; *State* v. *Mackey,* 6 Pac. Rep. 648; *Ty.* v. *Kay,* 21 Pac. Rep. 152. The court's instruction that a number of witnesses testified that defendant had admitted forming an idea to kill the deceased, and that he struck him on the neck with a knife—causing his death—was also erroneous as expressing an opinion as to the weight of evidence. *Snyder* v. *State,* 59 Ind. 105; *Brewster* v. *State,* 63 Ga. 639; *Peo.* v. *Kindleberger,* 34 Pac. Rep. 852; Thomp. Tr. § 2330. It was also erroneous as singling out certain evidence, and ignoring other evidence of equal importance. *Logg* v. *State,* 92 Ill. 598; *Hoge* v. *Peo.,* 6 N. E. Rep. 796; *Williams* v. *State,* 65 N. W. Rep. 783; *Peo.* v. *Clark,* 62 N. W. Rep. 1117. The court erred in instructing the jury that the defense of insanity has been abused and brought into discredit as the last resort in cases of unquestionable guilt, and that it has been an excuse to juries for acquittal when their own and public sympathy have been with the accused, especially when the provocation to homicide has excused it according to public sentiment. This language was calculated to prejudice the jury against the defense of insanity. It was an expression of opinion that the defendant was guilty and had resorted to an unwarranted defense. *Simmons* v. *State,* 62 Miss. 243; *Dawson* v. *State,* 62 Miss. 241; 14 Cent. Dig., § 1837; *Spencer* v. *State,* 50 Ala. 124; *Peo.* v. *Kelly,* 35 Hun. 295; *Walker* v. *State,* 37 Tex. 366; *Albin* v. *State,* 63 Ind. 598, 14 Am. St. Rep. 43, and note; *Aszam* v. *State,* 23 N. E. Rep. 123. An instruction that assumes the exitsence of a fact which should be left to the jury for ascertainment, is erroneous, and is not cured by a general instruction that the jury are the exclusive judges of all questions of fact, and that the burden was on the state to establish the allegations of the indictment beyond a reasonable doubt. *State* v. *Hatcher,* 44 Pac.

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Rep. 584; *Belt* v. *Peo.*, 125 Ill. 584; *Cannon* v. *Peo.*, 30 N. E. Rep. 1030. The court erred in instructing the jury that "while the accused party cannot make evidence for himself by his subsequent declarations, on the other hand he may make evidence against himself, and when these declarations amount to admissions against himself, they are evidence to be considered by the jury." 1 Greelf. Ev., § 201; *State* v. *Laliyer*, 4 Minn., 281; *State* v. *Young*, 24 S. W. Rep. 1038; *Blackburn* v. *State*, 23 O. St. 146; *State* v. *Martin*, 28 Mo. 530; *State* v. *Brooks*, 12 S. W. Rep. 633; *State* v. *Brown*, 16 S. W. Rep. 406; *Jones* v. *State*, 25 Am. St. Rep. 715; *Peo.* v. *Strong*, 30 Cal. 151; *Griswold* v. *State*, 24 Wis. 144; Wharton's Crim. Ev., § 688. To single out a party and discredit his testimony, to place him upon a different plane from that of other witnesses, to tell the jury, as was done in this case, that the testimony of the defendant should not be weighed by them, except by short measure, was unfair to the defendant and prejudicial to his rights. *Unruh* v. *State*, 105 Ind. 117; *Hicks* v. *U. S.*, 150 U. S. 442; *Peo.* v. *Pearsall*, 15 N. W. Rep. 98; *State* v. *White*, 39 Pac. Rep. 160; *State* v. *Nordstrom*, 7 Wash. 506; *Harris* v. *Peo.*, 82 Ill. 430; *Peo.* v. *Van Eman*, 45 Pac. Rep. 522; *State* v. *Hoy*, 86 N. W. Rep. 98; *Ty* v. *O'Hara*, 1 N. D. 30. The court erred in instructing the jury "that no verdict could safely be rendered upon the evidence of the accused party only, under such circumstances. If it were recognized, by such a verdict, that a man on trial for his life could secure an acquittal by simply testifying himself that he had committed the crime charged under a delusion, an inspiration, an irresistible impulse, this would be to proclaim an universal amnesty to criminals in the past, and an unbounded license for the future, and the courts of justice might as well be closed." *Greer* v. *State*, 53 Ind. 420; *State* v. *Bird*, 8 N. E. Rep. 14; *Buckley* v. *State*, 62 Miss. 705; *State* v. *Johnson*, 16 Nev. 36; *State* v. *Holloway*, 23 S. E.. Rep. 168; *Ryder* v. *Peo.*, 110 Ill. 11; *Newman* v. *Peo.*, 63 Barb. 630; *Com.* v. *Pipes*, 27 Atl. Rep. 839. Defendant's request for an instruction to the jury "that if the defendant was not conscious of the act, he should be acquitted," was not too late but in proper time. *Preston* v. *State*, 26 So. Rep. 736; *Peo.* v. *Demasters*, 39 Pac. Rep. 35; *Brooks* v. *State*, 23 S. E. Rep. 413; *Peo.* v. *Garbutt*, 17 Mich. 9.

W. B. Dickson, State's Attorney (*Cochrane & Corliss*, of counsel) for respondent.

The witness Clarence Mears did not show himself qualified to give a non-expert opinion. He had a speaking acquaintance with defendant, only; didn't see anything particular or out of the ordinary in his appearance on January 3rd, except that he was rubbing his hands and walking up and down with his head down. Rog. Exp. Test. 8; *First Nat. Bank* v. *Wirebach*, 106 Pa. St. 37; *Peo.* v. *Levy*, 12 Pac. Rep. 791; *State* v. *Crisp*, 29 S. W. Rep. 172; *O'Connor* v. *Madison*, 57 N. W. Rep. 107; *State* v. *Gaddis*, 42 Ia. 268; *Shaver* v. *McCarthy*, 5 Atl. Rep. 614. To warrant an opinion as to sanity or insanity by

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a non-expert witness, some knowledge of the acts and conduct of the person whose sanity is questioned must appear. The facts stated should show a rational ground for an opinion, and show that the witness is qualified to give it. *State* v. *Brooks,* 4 Wash. 328; *Prentiss* v. *Bates,* 17 L. R. A. 494; *Yanke* v. *State,* 51 Wis. 464; *Woodcock* v. *Johnson,* 36 Minn. 217; *Foster* v. *Dickerson,* 64 Vt. 233. The determination of the competency of this witness to give an opinion was within the discretionary power of the court. 1 Clevenger Med. Jur. 576; *Peo.* v. *Levy,* 12 Pac. Rep. 794; *Peo.* v. *Pico,* 62 Cal. 53; *Colle* v. *State,* 75 Ind. 513; *Denning* v. *Butcher,* 59 N. W. Rep. 569; *Boorman* v. *Ass'n.,* 62 N. W. Rep. 934. It was not error to receive the opinion of John L. Robertson, the sheriff who made the arrest. *Bolling* v. *State,* 16 S. W. Rep. 661; *Peo.* v. *Borgetto,* 58 N. W. Rep. 328. The omission of the words "without being conscious thereof," when the court read § 6814, Rev. Codes, to the jury, was clearly an inadvertence. His attention not having been called to it by an exception made at the time, and no request made upon the court to re-read the section or correct his omission, the error was waived. *Peo.* v. *Kernagham,* 14 Pac. Rep. 568; *Benton* v. *State,* 30 Ark. 335; *Carroll* v. *State,* 45 Ark. 548; *West v. Ty.,* 36 Pac. Rep. 207; *Peo.* v. *Olson,* 22 Pac. Rep. 125; *Peo.* v. *Barney,* 47 Pac. Rep. 41; *State* v. *Smith,* 31 Atl. Rep. 206; *State* v. *Potter,* 15 Kan. 311; 8 Enc. Pl. & Pr. 266, 288; 11 Enc. Pl. & Pr. 217; *Paulson* v. *Peo.,* 63 N. E. Rep. 144; *State* v. *Montgomery,* 9 N. D. 409; *Peo.* v. *Hamm,* 44 Cal. 100; *Mason* v. *Peo.,* 2 Colo. 373; *Lewis* v. *State,* 16 S. E. Rep. 986; *Barnett* v. *State,* 100 Ind. 177; § 8176, Rev. Codes. Defendant's request for an instruction that if he was not conscious of the act which resulted in Mallem's death, he was entitled to an acquittal, having been presented to the judge too late, as shown by the bill of exceptions, was the same as if not presented at all. *U. S.* v. *Gilbert,* 25 Fed. Cas. 1287; *Grubb* v. *State,* 20 N. E. Rep. 257; *Benson* v. *State,* 21 N. E. Rep. 1109; *State* v. *Rowe,* 4 S. E. Rep. 506. And this feature of the law was fully and fairly covered by the court's general charge, hence no error could result to appellant by the omission. *State* v. *McGahey,* 3 N. D. 293; *Dealey* v. *Elev. Co.,* 4 N. D. 269; *State* v. *Kent,* 5 N. D. 516; *State* v. *Campbell,* 7 N. D. 63. The court's instruction that if the evidence was believed that the defendant was guilty of murder, or innocent of any crime, could not be prejudicial, because there was no evidence in the case making an instruction as to the lower degrees of murder or manslaughter necessary. Kerr on Homicide, § 526; *State* v. *Kronstett,* 61 Pac. Rep. 805; *Peo.* v. *Estrado,* 49 Cal. 171; *Teal* v. *State,* 68 Am. Dec. 482; *State* v. *Downs,* 3 S. W. Rep. 319; *Peo.* v. *Littlejohn,* 11 S. E. Rep. 639; *State* v. *Rose,* 4 S. W. Rep. 734; *Love* v. *State,* 11 Tex. App. 502; *State* v. *Mears,* 66 Mo. 13; *Lewis* v. *State,* 15 S. E. Rep. 697; *Ragland* v. *State,* 27 So. Rep. 987; *Jackson* v. *State,* 15 S. E. Rep. 677; *Sanders* v. *State,* 38 S. E. Rep. 841; *Gardner* v.

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State, 17 S. E. Rep. 86; *Rockmore* v. *State*, 19 S. E. Rep. 32; *Peo.* v. *Lee Gam*, 11 Pac. Rep. 183; *State* v. *Parigo*, 45 N. W. Rep. 399; *Strong* v. *State*, 88 N. W. Rep. 772. The instruction challenged under this assignment is in the same language as in the Guiteau case. *U. S.* v. *Guiteau*, 10 Fed. Rep. 163; 3 Guiteau's Tr., 2607, 2331, 2569; *Teal* v. *State*, 68 Am. Dec. 482; *State* v. *Hall*, 68 S. W. Rep. 344; *Peo.* v. *DeGarmo*; 76 N. Y. Supp. 477; *State* v. *Cole*, 63 Ia. 700; *State* v. *Jones*, 64 Mo. 392; *Peo.* v. *King*, 25 Cal. 507; *Jackson* v. *State*, 15 S. E. Rep. 677; *Peo.* v. *Cannon*, 139 N. Y. 645. Appellant's tenth, eleventh and twelfth assignments of error are directed to expressions of opinion by the court as to the weight of the evidence. The instructions excepted to were taken literally from the Guiteau case. *U. S.* v. *Guiteau*, 10 Fed. Rep. 163. The sole issue in the case was upon the question of defendant's insanity. The defendant became a witness in his own behalf, but did not deny the killing or any circumstances proven by the state, connected therewith. He produced no evidence in contradiction of any of the circumstances proven by the state. He admitted a dream-like memory of the killing, and said that Mallem would forgive him if they could meet. The defendant having failed to deny material facts testified against him, the inference was as adverse as against a party to a civil action. *State* v. *Anderson*, 1 S. W. Rep. 141; *Anderson* v. *State*, 4 N. E. Rep. 63; *Stover* v. *Peo.*, 56 N. Y. 315; *Peo.* v. *O'Brien*, 6 Pac. Rep. 695; *State* v. *Witham*, 72 Me. 533. Where there is and can be no other deduction from the evidence than the one stated by the court, the rights of the defendant are not prejudiced by such instructions as were here given. *Sawson* v. *State*, 33 Tex. 496; *Beers* v. *Ry. Co.*, 19 Conn. 566; *State* v. *Smith*, 49 Conn. 388; *Beurmann* v. *Van Buren*, 44 Mich. 496; *Peo.* v. *Carey*, 84 N. W. Rep. 1087; *Gregg* v. *Mallet*, 15 S. E. Rep. 937; *State* v. *Fountain*, 81 N. W. Rep. 162; *State* v. *Huff*, 40 N. W. Rep. 720. The court repeatedly instructed the jury that it was their province and not the province of the court to decide the facts; that if at any time he seemed to express an opinion on the facts, that it was not binding upon the jury, saying: "I want to particularly reiterate here that while I have stated and commented upon a part of the evidence in the case, if I at any time seem to express any opinion upon it, which I did not, or do not design to do, you are the sole and exclusive judges of all such facts, and the weight of the evidence and credibility of the witness, and you must draw your own conclusions from the evidence. You are the sole and exclusive judges of all questions of fact arising in the case. Your verdict must be arrived at from a consideration only of the evidence." In the light of this caution to the jury the expressions would be deemed advisory only, and not prejudicial. § 8217, Rev. Codes; 11 Enc. Pl. & Pr. 91; *Peo.* v. *Cannon*, 139 N. Y. 645; *Johnson* v. *Com.*, 85 Pa. St. 54; *State* v. *Meshek*, 61 Ia. 316; *Peo.* v. *Zachello*, 60 N. E. Rep. 1051; *Peo.* v. *Hawkins*, 64 N. W. Rep. 739; *Peo.* v. *Warren*, 81 N. W. Rep.

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360; *State* v. *Fountain,* 81 N. W. Rep. 162; *State* v. *Riley,* 18 S. E. Rep. 168; *State* v. *Burton,* 18 S. E. Rep. 657; *State* v. *McIntosh,* 13 S. E. Rep. 1033; *State* v. *McLean,* 10 S. E. Rep. 518; *Taylor* v. *State,* 24 So. Rep. 689; *State* v. *Mitchell,* 6 So. Rep. 785; *Duffy* v. *Peo.,* 5 Parker's Crim. Rep. 321; *Hemmingway* v. *State,* 8 So. Rep. 317; *Peo.* v. *Carey,* 84 N. W. Rep. 1087; *State* v. *Rose,* 47 Minn. 47; *Peo.* v. *Johnson,* 38 Pac. Rep. 91; *Peo.* v. *Speigel,* 28 N. Y. Supp. 1040, 38 N. E. Rep. 284. Our statute permits the court to sum up the evidence, and was passed in the light of the foregoing cases, the rule of which it establishes for this state. § 8217, Rev. Codes; *Com.* v. *Dougherty,* 21 Atl. Rep. 228; 11 Enc. Pl. & Pr. 195, and note. In some jurisdictions where the evidence for the state was unchallenged, as in this case, it is permissible for the court to advise conviction. *Taylor* v. *State,* 25 So. Rep. 689; *Peo.* v. *Richmond,* 26 N. E. Rep. 770; *Peo.* v. *Ackerman,* 45 N. W. Rep. 367; *Peo.* v. *Warren,* 81 N. W. Rep. 361; *Peo.* v. *Neumann,* 48 N. W. Rep. 291. It was error for the court to instruct the jury to the effect that if they believed the testimony for the state, the homicide was committed with malice aforethought, providing defendant was capable of criminal intent; and that there was no denial made by the defendant of having committed the act. *Wooten* v. *State,* 5 So. Rep. 39, 1 L. R. A. 819; *U. S.* v. *Guiteau,* 10 Fed. Rep. 163; *State* v. *McLean,* 10 S. E. Rep. 518; *Ettinger* v. *Com.,* 98 Pa. St. 338; *Peo.* v. *Hawkins,* 64 N. W. Rep. 739; *State* v. *Walker,* 78 Mo. 380; *State* v. *Cleaves,* 8 Am. Rep. 422; *State* v. *Anderson,* 1 S. W. Rep. 141; *Stover* v. *Peo.,* 56 N. Y. 315; *Bogland* v. *State,* 27 So. Rep. 983; *Com.* v. *Eckerd,* 34 Atl. Rep. 306. Malice is presumed from the killing, and it was proper for the court to so charge. *Peo.* v. *Kernagham,* 14 Pac. Rep. 568; *Lewis* v. *State,* 15 S. E. Rep. 697; *Butler* v. *State,* 19 S. E. Rep. 51; *Cathcart* v. *Com.,* 37 Pa. St. 112; *Vance* v. *State,* 9 S. E. Rep. 945; *Com.* v. *Drum,* 58 Pa. St. 17; *Dorsey* v. *State,* 35 S. E. Rep. 651. The cases cited by appellant to the point that a grouping of the facts on one side is prejudicial are all cases where there was a conflict of evidence. It is apparent that no objection can arise to a grouping of facts where there is no dispute or conflict as to the facts stated. *Beers* v. *Ry. Co.,* 19 Conn. 570; *Keyes* v. *Fuller,* 9 Ill. App. 528; *Peo.* v. *King,* 27 Cal. 513; *Peo.* v. *Dick,* 34 Cal. 663; *Peo.* v. *Burns,* 30 Cal. 207; *State* v. *Garrand,* 5 Ore. 220; *State* v. *Whitney,* 7 Ore. 393; 10 Enc. Pl. & Pr. 168. The right to state the evidence includes the right to state that there is no evidence as to particular facts. *Peo.* v. *Dick,* 34 Cal. 663; *Driskill* v. *State,* 7 Ind. 338; *Barker* v. *State,* 48 Ind. 167; *Peo.* v. *Fanning,* 131 N. Y. 665; *Whiting* v. *State,* 27 N. E. Rep. 99; *State* v. *Moorman,* 2 S. E. Rep. 621; *Lovejoy* v. *U. S.,* 128 U. S. 171. It is not proper ground for exception that the court stated a part of the testimony on a certain point without stating all. *Allis* v. *U. S.,* 15 Sup. Ct. Rep. 38; *Howell* v. *Peo.,* 5 Hun. 620, 69 N. Y. 607; *U. S.* v. *Babcock,* 24 Fed. Cas. 14486; *Brown* v. *Com.,* 78 Pa. St. 122. The giving of an argu-

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mentative instruction cannot constitute reversible error in such a case, because the jury cannot be misled by it. *McQueen* v. *State*, 10 So. Rep. 433; *Peo.* v. *Fenwick*, 45 Cal. 287; *Peo.* v. *Donahue*, 45 Cal. 321; *Mackey* v. *Peo.*, 2 Colo. 13; *Pascal* v. *State*, 3 S. E. Rep. 2; *Case* v. *State*, 17 So. Rep. 379; *State* v. *Brooks*, 30 Pac. Rep. 147; *Edelhoff* v. *State*, 36 Pac. Rep. 627. The assignment as to the court's instruction as to the abuse of the defense of insanity is not well taken. *U. S.* v. *Guiteau*, 10 Fed. Rep. 163, 3 Crim. L. Magazine, 347; *Sawyer* v. *State*, 35 Ind. 86; *Sanders* v. *State*, 84 Ind. 148; *Butler* v. *State*, 97 Ind. 388; *Peo.* v. *Kernagham*, 14 Pac. Rep. 508; *Com.* v. *Webster*, 5 Cush. 295; *McKee* v. *Peo.*, 36 N. Y. 113; *Peo.* v. *Dennis*, 39 Cal. 625; *Peo.* v. *Bumberger*, 45 Cal. 650; *State* v. *Richards*, 39 Conn. 595. The court's instruction to the jury to satisfy themselves about the condition of the prisoner's mind for a considerable period of time before the conception of the homicide entered into it, was not prejudicial, because the defendant testified on the trial that when his sister confessed to him, it worked on his passions and he made up his mind to kill Mallem; that after thinking the matter over all night he decided to kill him. In view of this testimony, and there being no contradiction of the facts assumed, excepting by the mere plea of "not guilty," no error could result. *Peo.* v. *McDowell*, 3 Pac. Rep. 724; *State* v. *Grayor*, 16 Mo. App. 558, 1 S. W. Rep. 365; *Kline* v. *State*, 10 S. W. Rep. 225; *Peo.* v. *Phillips*, 11 Pac. Rep. 493; *Peo.* v. *Lee*, 14 Pac. Rep. 310; *Davis* v. *Peo.*, 24 N. E. Rep. 192; *Smith* v. *State*, 28 Ind. 321; *Brewer* v. *Com.*, 12 S. W. Rep. 672; *Wesley* v. *State*, 75 Am. Dec. 62; *Hill* v. *State*, 60 N. W. Rep. 916; *State* v. *Douglas*, 28 W. Va. 297; *State* v. *Herold*, 9 Kan. 194. Appellant cannot predicate error upon any of the instructions which assumed that Mallem was killed by accused, because, by the requests for instructions presented by appellant to the court, the court was asked to assume this fact. Having invited this construction of the evidence, he cannot complain of it now. *Com.* v. *Lawless*, 103 Mass. 425; *Com.* v. *Brigham*, 123 Mass. 248; *Peo.* v. *Lopez*, 59 Cal. 362; *Com.* v. *Locke*, 114 Mass. 288; *Peo.* v. *Biggins*, 3 Pac. Rep. 853; *Tuller* v. *State*, 8 Tex. App. 501; *Hudson* v. *State*, 13 S. W. Rep. 388.

WALLIN, C. J. The appellant is charged with the offense of killing one Andrew Mallem, with malice aforethought and premeditation, in the county of Cavalier, on the 3d day of January, 1901. After pleading not guilty, the defendant was tried by a jury, and found guilty of the offense charged in the information, and as a penalty the jury directed that the defendant should be confined in the state penitentiary during the remainder of his life. Defendant is now confined in the penitentiary upon a sentence entered by the district court pursuant to the verdict. The trial commenced on July 16, 1901. In this court counsel claim that the defendant should be awarded a new trial upon the ground that prejudicial error occurred in the case during the proceedings in the district court. Appellant's counsel does not ask for a review of the evidence, or claim that the verdict returned by the

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jury is not justified by the evidence offered at the trial, but does claim that numerous errors of law occurred during the trial, to which exceptions were saved by the defendant. A large number of errors are assigned upon the instructions which were given to the jury by the trial court, and some are predicated upon instructions requested in behalf of the defendant, and which were refused by the trial court. Error is also assigned upon certain rulings made upon the admission of the testimony in the case.

A proper consideration of the errors alleged requires that a preliminary statement should be made of the more important facts of the case as disclosed by the record. Many very important facts are uncontroverted, and there is a mass of evidence in the record which is not attempted to be contradicted, and counsel on both sides have presented in their briefs a succinct statement of the facts of the case which are not contested, and these statements do not differ, except in details which are relatively unimportant. The uncontroverted facts, as gathered from the record, may be stated as follows: On January 3, 1901, the defendant, who is a farmer, was residing on his farm, which was situated within a few miles from the village of Milton, in Cavalier county. Defendant was a bachelor, and at the time in question his family consisted only of himself, an unmarried sister, Mary Ann Barry, and the deceased, Andrew Mallem. A neighbor, one John Wild, lived about three-quarters of a mile distant from the defendant's residence. It is undisputed that parties residing at Milton, after hearing certain statements in the nature of confessions made by the defendant at Milton on January 3, 1901, visited the defendant's farm on that day, arriving there about noon. These parties went to defendant's barn, and there, behind a horse called "Joe," they found the dead body of Andrew Mallem. The body was still warm. There was a rope around the neck of the body, one end of which extended downward in front, and then, after passing between the legs, extended out behind the body. There was blood on the rope and on the floor near the body. A wound about one inch wide at the surface was found on the right side of the neck of the deceased. This wound penetrated to a considerable depth, and the post-mortem held later showed that the carotid artery and the jugular vein were both severed, and it appears that the wound was necessarily a mortal wound. The evidence shows that all the inmates of the Barry home, including the deceased, were at the house in the morning of the day in question, and that shortly after 9 o'clock a. m. of that day defendant started from home, taking his sister with him, and that he drove his own team; and that the defendant then drove to Milton, arriving there about 10 o'clock a. m. What was said and done by the defendant during this drive to Milton and after his arrival there are facts of very great importance in their bearing upon the controlling questions in this case, but the evidence upon which these facts rest, except in minor particulars, is not at all conflicting. We find a succinct narrative of these facts in the brief of counsel for the respondent, and one

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which we find to be fully sustained by the evidence. For purposes of convenience we here present an extract from said narrative: "On the morning of January 3, 1901, the defendant harnessed and hitched his team; put a fur coat and cap on his sister; changed his own clothes, putting on a clean new suit and a coonskin overcoat. He drove up to the house of one John Wild, a neighboring farmer, accompanied by his sister, Mary Ann Barry. Her hands and ears were frozen. Defendant asked to have his sister cared for, stating that she had been out that morning, and got her fingers frozen; that he was going to town to get the doctor, and would send him out at once; that he had news to tell; that he had killed his man that morning. He borrowed a pair of mittens, and drove to Milton, arriving there at about 10 o'clock a. m. He stopped in front of a livery barn; asked an acquaintance to hold his team; said he wanted to see Norgard, who was standing across the street. He approached Norgard, who was a justice of the peace, and inquired: 'Are you a justice of the peace?' Receiving an affirmative answer, he stated that he wanted to give himself up; that he had murdered a man, Andrew Mallem, that morning, and had come in to give himself up; that he was not joking; that he gave Mallem five minutes to pray; Mallem said: 'God have mercy on me!' He then stuck him with a knife, and that he died in two minutes. He indicated where he had stuck Mallem, pointing with his finger to the right side of the neck at a point about an inch below the angle of the jaw. Said that he tried to hang him with a rope, but couldn't, so finished him with a knife. That Mallem fought him like a hero when he tried to hang him. That Mallem punched him in the stomach, and knocked his wind out. That he killed him a few minutes past 9 o'clock that morning. Defendant then started toward the telephone, saying that he was not going to escape, but was going to telephone; that he wanted to send the doctor out to examine his sister; that Mallem had ruined her, and, if she was not in the condition he claimed, he wanted to be hung to a telegraph pole. He exhibited a jackknife, saying, 'This is what I did it with'; and, upon his attention being called to the lack of blood on the blade, stated that he had washed the knife. When asked his reason for the deed, he stated that the preceding night his sister confessed to him that Mallem had raped her three years before, and that lately he had been taking liberties with her person, and that this had worked on her passions so that she jumped out of her mind; that when she made the confession to him it so worked on his passions that he couldn't control himself, and, after thinking the matter over all night, he decided to kill Mallem; that on this morning he went down to the barn, caught Mallem behind the 'Joe' horse, told him he was going to kill him, gave him a choice to die by the rope or by the knife; that Mallem said, if he had to die, he didn't have any choice. Defendant then tried to hang him; found that he couldn't, so he gave him five minutes in which to pray. Mallem said, 'God have mercy!' and he finished him with the knife. Within a few minutes after arriving in Milton, defendant met one Allan McDonald, deputy sheriff,

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and an old acquaintance. Upon being saluted by McDonald, defendant replied, 'Yes, Mac, I am in your charge,' and went in the custody of the sheriff to the telephone station, where he asked to have the county coroner, residing at Langdon, notified; also Mr. Dickson, the state's attorney. He then requested that Andrew Morken, a cousin of deceased, residing at Osnabrock, be advised, so that he could take charge of the remains; telephoned for a messenger to go to the country and get his brother, Tom, to go out and care for his stock; and also to go after Mrs. Dick Barry, a sister-in-law, with a request that she repair to John Wild's, where he had left Mary Ann, to care for her."

As bearing upon the defendant's mental condition at the time these statements in the nature of confessions were made by him on the 3d of January, his counsel calls attention to certain discrepancies in such statements. Upon this point we quote from the brief of appellant's counsel: "Some one asked if he was sure Mallem was dead, when the defendant replied: 'Yes, I stayed with him until he died. He died in two minutes.' He then related the claimed confession of his sister as to Mallem's conduct with her. Again, while in the same store, he told that his sister had made a confession to him the night before, had then lost her mind, and gone out on the prairie, where she remained all night. That he found her in the morning, took her over to Jack Wild's, and drove back home, found Mallem in the barn, couldn't control himself, and killed him. As showing the different stories told by Barry, take the testimony of T. W. Cocks, on cross-examination. He said: 'Barry told the story in different ways. He told me, when I went in first, that he had taken his sister over to Wild's, and when he came back he found the man in the barn, and killed him. Then he told some other parties in there that he had taken his sister in the house when he found her hands and feet were frozen, and then went out and killed him. And then he told somebody else that he had made up his mind to kill him three or four days before. These were all told in my presence during the one visit to the drug store. He told me that Mallem said, 'Lord help me!' two or three times, and in his story to Mr. Helgesen he said, 'God have mercy on me!' The Rev. Sykes heard Barry talking that forenoon, and heard him say, 'It is an awful thing, an awful thing; but I couldn't help it, but I couldn't help it.'"

The defense of insanity was interposed, and at the trial the defendant's mental condition on January 3, 1901, was a subject of special inquiry, and a very large amount of testimony was offered upon this question. The defendant testified in the case, and stated, in substance, that he had only a dream-like recollection of the events that occurred on the day of the homicide, and had no recollection whatever of driving to the house of John Wild, or of leaving his sister there; and further testified that he had no recollection of seeing or conversing with the various parties with whom he undoubtedly conversed at Milton, and to whom he gave the details of the homicide. Defendant

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further stated, regarding his mental condition, that he began to grow better in the following month of April, but did not fully regain his mental control until the month of May next after the homicide. Referring to the morning of the homicide, defendant testified that his sister—who, according to defendant's testimony, was then insane—ran out of the house a second time. He said: "She went away the second time, and I didn't know where I found her. Q. What next took place? A. I don't remember anything more that took place that day. I don't remember seeing Mallem after that. Don't remember having any fight with Mallem, or killing him. I have heard the witnesses testify, but I can't remember what was done. I have tried to remember, and it seems a dream to me. * * * When put in jail, I thought somebody was giving me stuff to drive me out of my mind. Thought it was in my victuals, and wouldn't eat." At the trial a great amount of testimony was offered tending to establish the fact of insanity in the defendant's family. This evidence was not met by countervailing testimony, and it shows that many of his relatives, including brothers, sisters, uncles, nephews, and other relatives, were at times insane, and some of them had been confined at different times in hospitals for the insane. There is also testimony which is undisputed tending to show that some of the defendant's relatives had been afflicted with epilepsy; and there was some evidence, coming from his relatives, that the defendant himself on a few occasions had experienced symptoms of something like epilepsy, but for a number of years prior to the date of the homicide no very marked symptoms of the disease were manifested by the defendant. He was a man of large physical frame, and had been successful as a farmer, and at the time of his arrest was in the possession of considerable means, which had been accumulated by his own energies and business judgment. The opinion evidence in the case touching the question of defendant's mental condition at the time of the homicide is voluminous, and the same was given by both professional and nonprofessional witnesses. Numerous non-experts were sworn, and were allowed to give their opinions as to the sanity of the accused on the day of the homicide. A number of nonexperts who testified in behalf of the defendant stated that, in their opinion, the defendant was out of his mind, or insane, at the time in question. Before giving opinions, such witnesses were examined as to their competency, and testified as to their acquaintance and relations with the accused, how long and intimately they had known him, and whether the witness on the day of the homicide particularly noticed the conversation and demeanor of the accused, and as to what he said and how he acted on that day.

The first error assigned arose upon the examination of Clarence Mears, a nonexpert witness, sworn for the defense, who, after testifying, in substance, that he knew the defendant in 1892, and that after an absence of some years he had met defendant, and had business relations with him in 1898 and 1899, and after that had a speaking acquaintance with the defendant, and met him frequently, and saw

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him on the day of the homicide, testified as follows: That he "heard him make a statement, but whether I could give it word for word I couldn't say. It was to the effect that he couldn't come to any other conclusion. Heard him say things on that day that I don't now remember. When I saw him, he was walking up and down, and rubbing his hands. It was at the time that he was walking up and down that he was talking. He wasn't talking to any one in particular. The reason I didn't understand what he was saying was that I didn't catch what he said; that was all. I didn't notice anything peculiar or out of the ordinary in his appearance that day, more than I have stated that he was rubbing his hands and walking up and down; had his head down." At the conclusion of this statement the defendant's counsel asked the witness the following question: "From the facts and circumstances, the conversations and statements made by Mr. Barry, and your observation and acquaintance with him, as you have detailed, before and on the 3d day of January, and basing your opinion upon that, did you, on that day, form an opinion as to his sanity or insanity?" to which counsel for the state objected as follows: "We object to the question, as incompetent under the law under the answers of the witness, that he has not a sufficient, or that he has not an acquaintance with sufficient, facts to entitle him to express an opinion," which objection was sustaied by the court. In support of this objection defendant's counsel claims that this ruling was erroneous for the reason that the preliminary examination of the witness showed that the witness had qualified himself to give an opinion as to defendant's sanity. Counsel for the prosecution, on the contrary, contend that the testimony showed that the witness was not competent to give an opinion; and, further, that the preliminary question of the witness' competency to give an opinion was a matter lying within the sphere of judicial discretion, and, as such, the same cannot be reversed except in cases of abuse, and that the facts show no abuse of discretion. The rule is well established, and applies to civil as well as to criminal cases, that upon an issue of insanity a layman, when called as a witness, may be required to give an opinion. But in such cases there must be laid a foundation upon which the opinion called for is to rest for support. The preliminary examination must develop sufficient facts to show the competency of the witness; i. e., sufficient to show that he is in a position to give an opinion which will possess at least some value as testimony. The foundation facts must furnish a rational ground for the opinion. See *State* v. *Brooks*, 4 Wash. 328, 30 Pac. Rep. 147; *State* v. *Williamson* (Mo. Sup.) 17 S. W. Rep. 172; *O'Connor* v. *Madison* (Mich.) 57 N. W. Rep. 105; *People* v. *Borgetto* (Mich.) 58 N. W. Rep. 328. The rule to be deduced from these cases is that a nonexpert will be allowed to express an affirmative opinion upon an issue of insanity only after he has testified to acts, conversations, or conduct which to some extent indicate insanity. See 2 Bish. New Cr. Proc. § 678. Applying this rule to the facts disclosed upon the preliminary examination of the witness Mears, we find no error in excluding his opinion from the jury. After stating that the de-

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fendant, when the witness saw him on the 3d of January, was walking about, and rubbing his hands, the witness said: "I didn't notice anything peculiar or out of the ordinary in his appearance that day, more than I have stated." We cannot discover any facts, as disclosed by this witness, upon which an opinion to the effect that the defendant was then insane could rest for support. But, in any event, this assignment of error cannot be sustained. In this class of cases the question of the competency of the witness to testify is one for the court, and is also a question lying within the sphere of judicial discretion; and the familiar rule that such discretion will not be reversed except in cases of abuse applies in the case of nonexperts as well as experts who are called to express opinions upon an issue of insanity. See *People* v. *Levy* (Cal.) 12 Pac. Rep. 791; *People* v. *Pico*, 62 Cal. 50; *Colee* v. *State*, 75 Ind. 511; *Denning* v. *Butcher* (Iowa) 59 N. W. Rep. 69. And see 1 Greenl. Ev. § 430p.

The fifth error assigned relates also to nonexpert testimony, and is based upon a ruling of the trial court permitting one Robertson, a witness for the state, sworn in rebuttal, to give his opinion upon the question of defendant's sanity on the day of the homicide. Counsel assails this ruling as error, and contends that the evidence was insufficient as a foundation to show the competency of Robertson to express an opinion upon the question. In ruling upon this assignment we shall deem it unnecessary to set out the foundation evidence in extenso, for the reason that we are quite clear, after a perusal of Robertson's testimony, that the ruling of the trial court admitting the same does not indicate any abuse of discretion. This witness was sheriff of Cavalier county on January 3, 1901, and had been treasurer of the county, and had known the defendant for six years. He saw him on the day of the homicide, and observed his manner, expression and conduct; but did not then converse with him, but was present and heard a conversation between defendant and others, had about 1 o'clock the next morning, in which the witness participated. The conversation did not relate to the homicide, but dealt with early frontier experiences and with defendant's experiences while threshing in earlier days. Witness also was present and heard defendant talk with a number of parties on the following day; among others, with a priest, who visited the defendant. Upon this foundation the witness was asked for his opinion upon the question of the defendant's sanity. Against objection, his opinion was expressed as follows: "Well, I would say that Mr. Barry was in trouble—trouble of mind—at the time, and the question of his sanity or insanity never occurred to me at all at that time. But I would say from his acts at that time and his conversation that he appeared to me to be sane." It is our opinion that the data upon which this testimony was permitted to be given was, if not sufficient to justify its admission, at least of a substantial character; and hence the ruling admitting the testimony cannot be condemned as an abuse of judicial discretion. No inflexible rule has been formulated by the courts which will exactly measure the amount

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of testimony required to show competency to give opinion evidence. In such cases the conclusion to be reached by a trial court is necessarily within the domain of discretion, and will depend upon the peculiar facts of each case as developed by the testimony.

As has been stated, numerous errors are assigned in the record which are based upon refusals of the trial court to give instructions to the jury as requested in behalf of the defendant. In this opinion we shall not deem it necessary to refer to any of said assignments save one, and this is mentioned only because it involves an important question of practice, and one likely to arise frequently. The facts upon which this assignment rests are as follows: The trial court had concluded the reading of its charge to the jury, and the jury were about to retire for deliberation upon their verdict, whereupon counsel for the defendant, before the jury retired, requested the court to give a certain instruction to the jury which counsel had written, and which was then delivered to the presiding judge by counsel. This request was in the following language: "If you find that the defendant was not conscious of the act which resulted in the death of Andrew Mallem, you must acquit the defendant." This request was refused, and the court indorsed on the request its reasons for such refusal as follows: "Refused. Handed me too late, and substantially covered by the charge." In our opinion, this instruction embodied a proper statement of the law of the case as applicable to defendant's theory of the evidence, and hence the same should have been given in charge to the jury, unless the reasons given by the trial court for not giving the same furnish valid grounds for the refusal to do so. After a careful consideration of the authorities upon the point, we have reached the conclusion that the request for the instruction, though tardily made, should not have been refused upon the ground that it was handed up too late. See *People* v. *Sears,* 18 Cal. 635; *People* v. *Demastors,* 105 Cal. 669, 39 Pac. Rep. 35; *Chapman* v. *McCormick,* 86 N. Y. 479; *Pfefferlo* v. *Railroad Co.,* 34 Hun. 497; *Leydecker* v. *Brintnall,* 158 Mass. 292, 33 N. E. Rep. 399; *Brick* v. *Bosworth,* 162 Mass. 334, 39 N. E. Rep. 36; *Crippen* v. *Hope,* 38 Mich. 344; *Carey* v. *Railway Co.,* 61 Wis. 71, 20 N. W. Rep. 648; *Allen* v. *Perry,* 56 Wis. 178, 14 N. W. Rep. 3. In a majority of the cases cited requests for instructions had been presented too late under rules of court, and in refusing the requests the trial court in some of the cases placed their refusal upon that ground. In this case the record discloses no rule of the district court, and we know of none, forbidding counsel to ask requests after the charge has been delivered to the jury, and before the jury retires; but, in the absence of any written rule regulating the practice, it is quite clear, in the nature of the case, that counsel are under an obligation to the court to frame and present their requests for instructions at some period prior to the delivery of the charge to the jury. To spring a request at the conclusion of the charge is often a source of embarrassment to the court, and, if this should be done by counsel purposely, and with a view to any such result, the act would be one

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involving a gross discourtesy to the court, for which counsel would be justly censurable. Nevertheless, under the rule established by the adjudications above cited, it may be prejudicial error to refuse to give an instruction asked for by counsel, even when the request comes too late under a rule of court. It may happen in exceptional cases that a charge, as given to the jury, is erroneous for the reason that the law applicable to a feature of the case has been wholly omitted from the charge, or it may be erroneous by reason of a misconception or mistaken view of the law as applicable to the case. In either of the instances supposed the parties to the litigation would be deprived of a highly important legal right, viz., the right to have the law of the case stated from the bench for the guidance of the jury. The duty of declaring the law of the case devolves upon the presiding judge, and this duty should be discharged before the jury retires for deliberation. Nor should any mere rule of court, adopted only to facilitate the administration of the law, be allowed to stand in the way of the performance of this very important duty. Our views could be emphasized by quotations from the cases above cited, but we will content ourselves upon this point by saying that the cases cited fully sustain our views upon this feature of the case. Whether the second ground of the refusal of the trial court to give the instruction asked is valid or not could be determined only by a careful examination of the whole charge as given. We deem it unnecessary in the present case to enter upon this examination, inasmuch as the court has reached the conclusion that a new trial of the action must be directed upon another ground, viz., upon certain instructions actually given to the jury.

In the course of its charge the trial court read from the statute relating to homicide, and explained to the jury that, in order to convict the accused, it would be necessary for the state to show beyond a reasonable doubt that the homicide was committed with malice aforethought. The jury were further instructed generally upon the matter of a reasonable doubt and as to the presumption of innocence; and the provisions of the statute enumerating the classes of persons incapable of committing crime in this state were read to the jury, and, in this connection, in commenting upon the statute which refers particularly to lunatics and insane persons, the jury was informed—and very properly—that persons of unsound mind, including those partially or temporarily deprived of reason, are, in this state, not incapable of committing crime, but, on the contrary, such persons are legally responsible for criminal conduct where the proof shows that at the time of committing the act they knew that the act was wrongful. After these and similar instructions of a general nature were given to the jury, the trial court, coming to the particular facts of this case, proceeded to instruct the jury as follows: "With regard to the evidence in this case there is very little comment required from the court except upon one question; the others being hardly matters of dispute. That the defendant struck Andrew Mallem with a knife is abundant-

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ly proved, if you believe the testimony of the state in this case. That the wound caused his death has been testified to by the surgeons most competent to speak, and they are uncontradicted. That the homicide was committed with malice aforethought or premeditation, if the defendant was capable of criminal intent, the malice and premeditated design can hardly be gainsaid, if you will bear in mind what I have already stated, and if you believe the testimony of the state in this case; and in fact there is no denial made by the defendant of ever having committed the act. Evidence has been submitted to you in this case by a number of witnesses showing that the defendant has admitted forming an idea to kill the deceased, and also that he did strike him on the neck with a knife, which wound was the cause of deceased's death; and the court instructs you as a matter of law that the admissions of the defendant are legal and competent evidence against him. Therefore all these facts and admissions, if believed by you, come up to the full measure of proof required to establish what the law denominates 'premeditated design' and 'malice aforethought,' if the defendant was capable of forming an intent. And thus I apprehend that you will have little difficulty in reaching a conclusion as to all the elements that make up the crime charged in the information, unless it be one of 'sound memory and discretion,' as it is called, which is only another expression for a 'sound mind.' We now approach the serious and difficult question in the case." The court further instructed as follows: "I charge you as a matter of law at the outset that if you believe the evidence of the prosecution as to the killing, that the defendant is guilty of murder as charged in the inforamtion or he is innocent of any crime." These instructions are assigned as error, and in support of the assignment counsel for the appellant uses this language in his brief: "The court at the very outset of the charge, expresses its opinion in the most positive language upon the weight and effect of the evidence. This is not within the province of the court. Our statute expressly provides that the court shall instruct only upon the law." This criticism of counsel upon the language quoted embraces two distinct features. Counsel first asserts that the trial court, in the language quoted from the charge, did "express its opinion in the most positive language upon the weight and effect of the evidence." Upon this question—one of fact—there is no doubt whatever existing in the mind of any member of this court. It is impossible, in our judgment, to fairly draw any other conclusion from the language used by the trial court. It is manifest, from the language itself, that the trial court not only expressed an opinion upon the weight of the evidence offered in behalf of the state in support of the charge as contained in the information, but, further, that the court intended to give the jury the full weight of its opinion to guide them in their deliberations upon the essential features of the offense as stated in the information. The language of the court, we think, imports that the trial court was of the opinion that the defense of insanity which the defendant had interposed presented the only practi-

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cal issue in the case; and that the facts charged in the information and constituting the essential elements of the offense were so completely established by uncontradicted testimony that they were "hardly matters of dispute." In this connection the fact was pointed out to the jury that the defendant, while on the stand as a witness, made no denial of the charge against him, and it is true that he did not; but it is equally true, and quite as important, in our opinion, that defendant did not, while on the stand, admit the killing of Andrew Mallem, but testified that he had no recollection of having done so, and no recollection of any of his acts or statements on the day of the homicide after the hour of about 9 o'clock a. m., except in a dream-like way. But, secondly, on this point counsel claims that under the law of this state the trial court is inhibited from expressing an opinion while instructing the jury upon the "weight or effect" of the testimony. Counsel says: "This is not within the province of the court. Our statute expressly provides that the court shall instruct only upon the law; * * * and it is highly improper, and reversible error, for a trial judge to express any opinion upon the weight or effect of any evidence in the case." This contention of appellant's counsel presents for determination a point which we regard as decisive of this case. The court having given clear and frequent expressions of its opinion upon the weight and effect of the evidence offered by the state in support of the charge, as embodied in the information, the question is presented whether, in doing so, the trial court disregarded the law in force when the trial took place, and, if it did so, then whether the error necessarily involved in doing so was prejudicial to any of the substantial rights of the defendant. In our opinion, this question must be answered in the affirmative. Whether, in a criminal case, a trial court, in charging the jury, may lawfully give expression to the views and opinions of the presiding judge upon the weight or the effect of the testimony in the case is a very old question in the courts, and one which has evoked a marked conflict of judicial opinion. Even at this late date in the history of the criminal law no rule upon the question has as yet received universal acceptance. At the common law and in the federal courts the right of the court to aid the jury by advising it of the views of the presiding judge as to the weight and effect of the testimony is firmly established. On the other hand, a majority of the states have, either by constitutional or statutory inhibitions, forbidden any expression by the trial judge, while instructing a jury, upon the weight or effect of the testimony in the case. The precise question involved was presented, and the rule settled, in this state soon after the state was admitted, in the first criminal case which reached this court. See *Territory* v. *O'Hare*, 1 N. D. 30, 44 N. W. Rep. 1003. In the case cited the court was required, in deciding the case, to place a construction upon section 343 of the Code of Criminal Procedure (Comp. Laws, § 7370, subd. 6). This statute declared: "The judge must then charge the jury; he may state the testimony and must declare the law, but must not

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charge the jury in respect to matters of fact." In the headnote of the O'Hare Case this court said that this statute "has, as to criminal trials, abrogated the common-law rule under which judges were permitted to give juries their own views and opinions upon the weight of the evidence and credibility of the witnesses." But the learned counsel for the state, in his brief, after calling attention to the common-law rule, and stating that it prevailed in the federal courts, and after citing numerous cases in which the common-law rule has been applied in giving instructions to juries, proceeds to say: "Our statute permits the court to sum up the evidence, and was passed in the light of the foregoing cases, the rule of which it establishes for this state"; and in support of this proposition counsel cites section 8217, Rev. Codes 1899. In passing upon the question presented in this proposition of counsel, it becomes necessary to inquire whether the rule laid down in the O'Hare Case has, by subsequent legislation, been swept away, and the common-law rule established. Counsel for respondent contends that this question must receive an affirmative answer, but, after a careful examination of the statutes in force when this case was tried, we are compelled to dissent from this view, and to rule that the law of this state, as laid down in the case cited, has never been abrogated or materially modified by the legislature.

From our standpoint, the question presented is not difficult of solution. The point turns upon the construction to be placed upon the language of two sections of the Code of Criminal Procedure,—sections 8176 and 8217, Rev. Codes 1899. The important language of section 8176 is as follows: "In charging the jury, the court shall only instruct as to the law of the case." Section 8217 declares: "In charging the jury the court must state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it states the testimony in the case, it must, in addition, inform the jury that they are the exclusive judges of all questions of fact." After repeated perusals of the language we have quoted from the existing statute, and after a careful comparison of the same with the language embraced in section 7370, Comp. Laws, we have no hesitation in saying that the rule of the common law permitting judges to instruct juries as to the credibility of witnesses and the weight of the evidence has never been established by the legislature of this state. It is certain that the existing statute, which was in force when this case was tried, does not declare in terms that the presiding judge may give his opinion to the jury upon the weight of the evidence or the credibility of witnesses, and we are wholly unable to draw any such inference from the statute, when the same is properly construed and considered as a whole. We concede that the terms of section 8217 imply that the court, in charging the jury, will be called upon to state "the testimony in the case." In fact, the court cannot, as a rule, discharge its duty by declaring the law of the case without stating, or in some way referring to, the testimony. But the language of section 8217, Rev. Codes, so far as we have quoted the same, is a literal copy

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of section 7405 of the Compiled Laws, and hence the same language was before this court when the case of *Territory* v. *O'Hare* was decided. In contemplation of law, there exists a marked and well-recognized distinction between stating the testimony to the jury on the one hand, and, on the other, announcing to the jury the views of the presiding judge upon the vital matter of the weight and effect of the testimony. The former becomes necessary in hypothetically applying the law to the testimony, but the jury is the proper tribunal to determine the weight or effect of testimony. But section 8176 declares in terms that "in charging the jury the court shall only instruct as to the law of the case." We construe this language as being inhibitory upon trial courts. Its manifest purpose, in our opinion, is to forbid the trial courts of the state from charging juries in criminal cases upon the weight or effect of the testimony, or upon the credibility of witnesses. So construed, the statute, as it stands, is even more emphatic upon the point in question than it was before the enactment of the amendatory statutes regulating the matter of giving instructions to juries; and it is in harmony with this interpretation of the amendatory enactments to add that the same, in our judgment, indicate a legislative intent to perpetuate and more clearly state the rule as it was expressed in the Compiled Laws; nor can we at all indorse the views of counsel to the effect that the law, as it stands, operates to establish the rule of the common law in this state. We think that no language will be found in existing legislation to warrant any such construction of the statute, or view of the law.

In charging the jury, the trial court distinctly stated that the jury were the exclusive judges of the credibility of the witnesses, the weight of the evidence, and of the facts of the case; and further stated that the court did not desire to express an opinion upon the weight of the evidence or upon the facts of the case. This feature of the charge, however, was not repeated in immediate connection with that portion of the charge which is under consideration here. But if this feature had been stated in close connection with the language we have quoted from the charge, the same could not, in our judgment, operate to cure the error involved in giving the jury the clear and emphatic expressions of opinion from the bench as contained in the language which we have quoted from the charge. The question whether an error of this grave character can be cured by telling the jury that they are the exclusive judges of the facts and the weight of the evidence was presented in the case of *Territory* v. *O'Hare,* and what is said in that case is equally applicable to the charge under consideration. As supporting our views, see, also, section 49, Blashf. Instruct. Juries. In the states where the court is permitted to express its opinion to the jury on the weight of the testimony, the judges are free to do so, and such expressions are not error where the jury are told by the court that they are the exclusive judges of the weight of the testimony and of the facts. But where the common-law rule is abolished a different rule necessarily obtains.

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and one which is at least intended to prohibit an expression from the bench on the weight or effect of the testimony. Our views upon this feature of the case have ample authority in their support. See *Kearney* v. *People* (Cal.) 17 Pac. Rep. 782; *People* v. *Webster,* 59 Hun, 398, 13 N. Y. Supp. 414; *Snyder* v. *State,* 59 Ind. 105; *Pena* v. *State* (Tex. Cr. App.) 63 S. W. Rep. 311; *State* v. *Lightfoot* (Iowa) 78 N. W. Rep. 41; *Rice* v. *State,* 3 Tex. App. 451; *McKenna* v. *People,* 18 Hun, 580; *State* v. *Carter* (Iowa) 83 N. W. Rep. 715; *Santee* v. *State* (Tex. Cr. App.) 37 S. W. Rep. 436; *People v. Gordon,* 88 Cal. 422, 26 Pac. Rep. 502; *State* v. *Addy,* 28 S. C. 4, op. 13, 4 S. E. Rep. 814; *Forrester* v. *Moore,* 77 Mo. 651. op. 660; *State* v. *Williams,* 31 S. C. 238, op. 258, 9 S. E. Rep. 853; *Hayden* v. *Parsons,* 70 Mo. App. 493; *People* v. *Casey,* 65 Cal. 260, 3 Pac. Rep. 874; *People* v. *Williams,* 17 Cal. 142, op. 147; *State* v. *Benner,* 64 Me. 267; *Ross* v. *State,* 29 Tex. 500; *Com.* v. *Barry,* 91 Mass. 276; *Moore* v. *State,* 85 Ind. 90; *People* v. *Webster* (Cal.) 43 Pac. Rep. 1114. See section 46, Blashf. Instruct. Juries, where the authorities under similar statutes are collated by states. Also, 11 Enc. Pl. & Prac. 97.

The reason underlying the rule we are considering is well expressed in *People* v *Williams,* 17 Cal. 142. In its opinion in that case the court said: "The court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court. A word, a look, or a tone may sometimes, in such cases, be of great, or even controlling, influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts; for of this matter, under our system, they are the exclusive judges." In *People* v. *Casey,* 65 Cal. 260, 3 Pac. Rep. 874, the trial court stated to the jury what certain testimony "showed." Commenting upon this, the supreme court used language which is in point under the statute of this state. The court said: "This is in clear violation of that clause of the constitution, which declares that 'judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.' To state the testimony is one thing. To declare what it shows is another, and very different, thing. It is for the jury exclusively to determine what the testimony shows." Similar language was employed in *People* v. *Gordon,* 88 Cal. 422, 26 Pac. Rep. 502. In a recent California case—*People* v. *Webster,* 43 Pac. Rep. 1114—the charge was assault with intent to commit a rape, and the prosecutrix testified that she was under the age of consent, and no evidence was introduced contradicting the witness. Upon this testimony the trial court instructed the jury, in effect, that the prosecutrix was under

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the age of consent. This was held error, and in commenting on the charge the following language was used: "The court had no more right to tell the jury that, under the evidence, the girl was under 14 years of age, than it had to tell the jury that, under the evidence, the offense charged had been proven. The court appears to have assumed that, the prosecutrix having testified that she was but 12 years of age, and no contradictory evidence having been offered, the fact was conclusively established as a matter of law, and therefore it was justified in so telling the jury. But such principle is wholly unsound." In *Com.* v. *Barry*, 91 Mass. 276, the court had occasion to consider a statute, which is, in its meaning, substantially like that in this state. The statute of Massachusetts reads: "The courts shall not charge the juries with respect to matters of fact, but may state the testimony and the law." Construing this statute, the court said: "The statute was not designed to deprive the court of all power to deal with the facts proved. On the contrary, the last clause of the section very clearly contemplates that the duty of the court may not be fully discharged by a mere statement of the law. By providing that the court may also state the testimony, the manifest purpose of the legislature was to recognize and affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law. In the case at bar the court exceeded the limit prescribed by the statute. If the language used by the court was intended to be applicable to the witnesses who had testified in behalf of the prosecution, it was an expression of opinion as to their credibility. As this was a matter of fact, within the exclusive province of the jury to determine, such expression of opinion went beyond a 'statement of the testimony,' and trenched on prohibited ground, being a charge to the jury 'with respect to matters of fact.'" In *Rice* v. *State*, 3 Tex. App. 451, a new trial was granted in a murder case for error involved in charging the jury upon the weight of the evidence. In its opinion the court said: "A charge is perfectly unexceptionable only when it sets forth the law applicable to the case, without expressing or intimating any opinion as to the weight of the evidence, or the credibility of statements made by the party accused or by the witnesses. *Ross* v. *State*, 29 Tex. 499; *Jones* v. *State*, 13 Tex. 175, 62 Am. Dec. 550; *Butler* v. *State*, 3 Tex. App. 48." In *Snyder* v. *State*, 59 Ind. 105, the court say in the head-note: "An instruction to the jury, on the trial of a criminal action, which is calculated, by its terms, to leave the impression upon the minds of the jury that the state has made out her case, and that, unless the evidence of the defendant raises in their minds a reasonable doubt, they should convict, is erroneous." See, also, *Moore* v. *State*, 85 Ind. 90. In *Pena* v. *State* (Tex. Cr. App.) 63 S. W. Rep. 311, the case was reversed for instructions upon the weight of the evidence. In *State* v. *Addy*, 28 S. C. 4, 4 S. E. Rep. 814, the court had occasion to construe a provision of the state constitution which reads:

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"Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." In reversing the case the court said: "So far as a rule upon the subject can be absolutely fixed, we think it well established in this state 'that the judge must carefully avoid expressing an opinion on the facts, leaving it to the jury to draw their own conclusions entirely unbiased by any impression which the testimony may make upon the mind of the judge. * * * He must not in any way indicate his opinion of the facts to the jury.'" The meaning of the same section of the constitution was again stated in *State* v. *Williams*, 31 S. C. 238, 9 S. E. Rep. 853, as follows: "This court has in several cases announced its understanding of the meaning and intent of this section, which, in brief, is as follows, to wit: While the judges may state the testimony, they cannot legally indicate their opinion, either expressly or impliedly, intentionally or otherwise, as to the credibility of the witnesses, or as to the truth of any fact in issue and the subject of the evidence. They may declare the law fully and freely; but whether a certain contested fact has been proved is entirely for the jury, which involves both the credibility of the witness and the existence of the fact, whether said fact depends upon direct and positive testimony or upon inferences to be drawn from other proved facts. In fine, the whole matter of finding the facts of the case must be left entirely to the jury, without suggestions or leadings by the court." Similar expressions of judicial opinion will be found in the cases cited, but upon this feature we shall add only certain extracts from Iowa cases which are strictly in point, because in them the trial court was dealing with cases where the evidence on the part of the state was ample, and not contradicted. In *State* v. *Carter*, 83 N. W. Rep. 715, the defendant was charged with obtaining a signature to a check by false representations, and in charging the jury the trial court used this language: "The proof shows beyond all controversy that the said J. L. Miller signed said check at the time named in the indictment." The supreme court held this to be erroneous, and said: "As defendant introduced no evidence, the court might as well have said that, as there was no contradiction in the evidence, all the elements of the crime were established. This, of course, it could not do. What it did do was no less objectionable." The case of *State* v. *Lightfoot*, 78 N. W. Rep. 41, is an instructive case. In its opinion this language is used: "The plea of not guilty puts in issue every material element of the offense charged, and, if the court may find one fact established, it may find all. We do not think the court has power to instruct that any essential fact is established, notwithstanding there may be no evidence to the contrary. The jury have the right to disbelieve any of the witnesses whose evidence they see fit to reject, and the court is powerless in criminal cases. *Com.* v. *Knapp*, 10 Pick. 477, 20 Am. Dec. 534. They have power to return a verdict of acquittal in a criminal case, although the evidence clearly shows the commission of the crime, and is uncontradicted. In this sense a jury in a criminal case is judge of both

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the law and the fact, for the court cannot set aside its verdict and grant a new trial. But, aside from this, as the jury must pass upon all questions of fact, they, of necessity, must weigh the evidence, and in doing this they have the right to disbelieve any and all the witnesses."

The court, in charging the jury in the case at bar upon the subject of insanity, used this language: "The defense of insanity has been so abused as to be brought into great discredit. It has been the last resort in cases of unquestionable guilt, and has been an excuse to juries for acquittal, when their own and the public sympathy have been with the accused, especially when the provocation to homicide has excused it according to public sentiment, but not according to law. For that reason it is viewed with suspicion and disfavor whenever public sentiment is hostile to the accused. Nevertheless, if insanity be established to a degree that has already in part and will hereafter be further explained, it is a perfect defense to the information for murder, and must be allowed due and full weight and consideration." In our opinion, this portion of the charge was error. It did not permit the defendant to interpose the defense untrammeled and free from condemnation from the bench. In the language quoted the trial court, while conceding that this defense might lawfully be interposed, placed the same under the ban of judicial disapproval by stating that the defense of insanity had been abused and brought into great discredit, and that it had been the last resort in cases of unquestionable guilt, etc. The defense of insanity is dictated by an enlightened and humane public sentiment, and in the state of North Dakota society is amply protected against the possible abuses of the defense by a somewhat drastic statutory provision under which an insane person may be punished for a criminal act, if, at the time of its commission, the proof shows that he knew the same was wrongful. See section 6814, subd. 4, Rev. Codes 1899. In this case the only defense sought to be supported by testimony was that of insanity, which is a strictly legitimate and legal defense under the statute in any criminal case. In such a state of facts we have no hesitation in holding that it was highly prejudicial to the substantial rights of the accused to handicap his sole defense by an instruction to the jury, which, in effect, disparaged the defense of insanity in its entirety. It may be quite true that this defense has been much abused, and it may be right and proper for courts of last resort and for the text-writers to animadvert upon the defense of insanity. Nevertheless, we think a jury should be left free to consider the defense upon its merits, and from their own point of view, uninfluenced by adverse comment from the bench. Our views have the support of judicial opinion. In *Alvin* v. *State*, 63 Ind. 598, the court said: "Where the judge is forbidden to express his views upon questions of fact or regarding the credibility of witnesses, he is necessarily inhibited from criticising any particular defense or cause of action, unless it be when proved insufficient in law. Therefore instructions respecting the defense of an alibi cannot be

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sustained if their natural tendency is to prejudice the jurors against it." Again, in *Aszman* v. *State*, 123 Ind. 347, 24 N. E. Rep. 123, 8 L. R. A. 33, the court said: "The court does not regard with favor any statements by the trial court which are designed to cast discredit or suspicion on any defense which is recognized by the law as legitimate, and which an accused person is seeking in good faith. In this respect we are unable to appreciate any well-grounded distinction between the defense of insanity, self-defense, or alibi." We are aware that there is some conflict of opinion upon the point under consideration, but we think the sounder rule is stated in the cases last cited, and from which we have made quotations. But in what we have said on this feature of the case we do not wish to be understood as disapproving proper cautionary instructions to juries to the effect that the jury should carefully consider and scrutinize the evidence in insanity cases. Such instructions are proper so long as they do not go to the extent of discrediting the defense of insanity as a defense.

It follows, from the views we have expressed upon the charge to the jury, that the judgment entered in the court below should be set aside, and a new trial awarded to the defendant, and this court will so direct. All the judges concurring.

(92 N. W. Rep. 809.)

RICHMIRE *vs.* ANDREWS & GALE ELEVATOR CO.

Appeal from Justice--Notice.

On an appeal from a judgment in justice's court the notice may properly be served on the adverse party, instead of the attorney appearing on the trial in justice's court. The provisions of section 6625, Code Civ. Proc., are not applicable in such cases.

Judgment Notwithstanding Verdict.

Under chapter 63 Laws 1901, it is not error to direct the entry of judgment notwithstanding the virdict, when it is established by the evidence, as a matter of law, that the verdict should have been directed, and it further appears from the evidence that it is not probable that a different state of facts would be shown on another trial, and a different result reached, than that reached by directing judgment, notwithstanding the verdict.

Appeal from district court, Cass county; *Pollock*, J.

Action by Willis Richmire against the Andrews & Gage Elevator Company. Judgment for defendants, and plaintiff appeals.. Affirmed.

J. F. Callahan and *Morrill & Engerud*, for appellant.

S. G. More and *Robert M. Pollock*, for respondent.

MORGAN, J. This is an action for damages for the conversion of

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a certain number of bushels of flax. The plaintiff worked for the person who farmed the lands as a farm laborer, and on November 14, 1900, filed a lien for his services from August 28 to November 12, 1900, for the sum of $136. It is admitted that the lien, as filed, is regular, and complies with all the provisions of Chapter 84, Revised Codes 1899, Civ. Code, under which such a lien may be filed. The answer to the complaint was a general denial and an affirmative defense of payment. The action was commenced in justice's court. Plaintiff recovered in that court. The defendant appealed to the district court, and in so doing served the notice of appeal on the plaintiff personally, and not on the attorney who had appeared for the plaintiff in justice's court. In district court the plaintiff moved to dismiss the appeal on the ground that the appeal papers should have been served on the attorney of record of the plaintiff, and not on the plaintiff personally. This motion was denied by the district court. The plaintiff excepted to that ruling, and the same is assigned as error in this court. Section 6771, Rev. Codes, provides that notice of appeal shall be served on the adverse party or his attorney. Section 6625, Rev. Codes, provides as follows: "The provisions of the Code of Civil Procedure shall govern the proceedings in justices' courts as far as applicable, when the mode of procedure is not prescribed by this Code, but the powers of justices' courts are only as herein prescribed." Section 5732, Code Civ. Proc., provides that when a party shall have an attorney in the action the service of papers shall be made on the attorney, instead of the party. Under these provisions it is claimed that section 6625, supra, must govern, and that service upon the party of the appeal notice is not any service that will confer jurisdiction on the appellate court. We cannot concur in this conclusion. We think that section 6625, quoted, conclusively points to an opposite conclusion. It is only when the provisions of the justices' court are silent on any matter that the provisions of section 6625 shall govern, if applicable. So far as the justices' court act lays down the procedure, that act governs, and is the law to be applied. If the justices' court act did not specify upon whom appeal papers should be served on an appeal to the district court, then section 6625 might govern. This, it seems to us, is the plain reading of that section. It says that the provisions of the Code of Civil Procedure shall apply "when the mode of procedure is not prescribed by this Code," referring, of course, to the Justices' Code. *Weimmer* v. *Sutherland*, 74 Cal. 341, 15 Pac. Rep. 849.

The next assignment, and the only other assignment or question raised in the case, specifies error by the district court in granting defendant's motion for judgment notwithstanding the verdict of the jury. At the close of the plaintiff's direct testimony, and at the conclusion of taking the testimony in the case, the defendant moved for a directed verdict, and both motions were overruled. The case was then submitted to the jury, with instructions to find a general verdict and to answer special interrogatories. They found a general verdict

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for the plaintiff and answers to the special interrogatories. The defendant, immediately on the receiving of the verdict, moved upon the minutes of the court for judgment in its favor notwithstanding the verdict of the jury, on the same grounds contained in the motion for a directed verdict. The motion was granted, an exception saved, judgment of dismissal of the action ordered, and such judgment was duly entered. The appeal to this court is from such judgment. The motion for judgment notwithstanding the verdict was made on the same grounds as the motion for a directed verdict, and is, in substance, as follows: That plaintiff has failed to make out a cause of action, and for the further reason that the flax was delivered at defendant's elevator by the plaintiff as the agent of the owners without disclosing that he had any lien thereon, and therefore waived any lien thereon; and that defendant shipped the flax out of the state in consequence of such delivery by the plaintiff. The motion for judgment was made under chapter 63, Laws 1901. So far as material, that law is as follows: "In all cases where, at the close of the testimony in the case tried, a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have a verdict directed in his or its favor, * * * whenever it shall appear from the testimony that the party was entitled to have such motion granted." This statute has introduced a practice in the trial of causes not hitherto found in any statute of the state. It is allied to the practice under the common law of ordering judgment non obstante veredicto. Under the common law such judgments could originally have been granted in plaintiff's favor only, and only in cases where the plea confessed the cause of action, and set up matters in avoidance that were insufficient, and not a defense or bar. Later the rule was extended so that such judgments could be applied for and entered in favor of defendants when the plaintiff's pleadings were insufficient to sustain a judgment in his favor. Such a judgment could not be entered in any cases where the pleadings stated a good cause of action or a valid defense. Such a judgment would not be entered in cases of defective pleadings, but only in cases where the cause of action or defense was without merit in whatever form pleaded. Before such a judgment would be entered, the defense or cause of action must be defective in matter of substance, and beyond the power of amendment. 2 Enc. Pl. & Prac. p. 912, and cases cited. This statute is taken from Minnesota, and is there enacted as chapter 320, Laws 1895. The law has frequently been construed by the supreme court of that state, and it is there held that such judgment will not be granted when it appears that a person has a good cause of action or defense, which has not been supported by reason of technical defects in the evidence, which may be supplied on another trial (*Cruikshank* v. *Insurance Co.*, 77

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N. W. Rep. 958); that it is not sufficient ground to warrant such judgment that the evidence was such that the trial court, in its discretion, ought to have granted a new trial. And that such judgment can be granted only in cases where it is clear upon the whole record that the moving party is entitled to judgment as a matter of law (*Marquardt* v. *Hubner,* 80 N. W. Rep. 616); that such a judgment will not be given when there is evidence reasontbly tending to support the verdict rendered (*Bragg* v. *Railway Co.,* 83 N. W. Rep. 511). See, also, *Merritt* v. *Railway Co.,* 84 N. W. Rep. 321. This statute having been construed by the supreme court of Minnesota before its enactment here, the construction placed thereon is binding upon this court, as the construction of it by the courts of the state from which it is taken is deemed to have become a part of the statute as enacted in this state.

We will now consider the evidence with a view of determining whether the district court was warranted in granting the motion under such evidence. The plaintiff worked for one Childs, who farmed the land as a tenant of one Swang, who owned the land. Before the crop was harvested, Mrs. Miller became entitled to claim Childs' interest in the crop under a mortgage from Childs. On October 22d the plaintiff marketed one load of flax at the defendant's elevator as the agent and at the request of Mrs. Miller. He received the cash for this flax, and turned it all over to Mrs. Miller. Later, and before November 10th, he hauled four more loads of flax as such agent, and left the same, as he claims, at the elevteor, without selling it. The elevator agent claims that these four loads were sold absolutely, but not paid for on delivery; that tickets showing price and weights were delivered to the plaintiff for these four loads. These tickets the plaintiff turned over to Mrs. Miller. During the delivery of the last load—and it was incidentally mentioned before—the plaintiff told the agent that he had a "labor bill that he must have satisfied out of the flax." The plaintiff also told the agent not to pay Swang or any one else until his claim was satisfied, and the agent promised not to do so. At the time these four loads were delivered at the elevator, nothing was said by the agent or by the plaintiff tending in any way to show that the flax was to be kept separate from other flax, or that it was not to be shipped in the ordinary course of business. When the last load of the flax was delivered at the elevator, Mr. Swang had notified the agent not to pay anybody but himself for this flax, and the plaintiff also notified the agent not to pay any one until his claim for labor lien was settled. The agent said that he would not pay anybody until they had settled their rights to the pay for the flax, as he must protect himself and his company. Subsequently Swang indemnified the company, and he was paid for the four loads, and the plaintiff was refused payment, after demand made for it. Swang was paid on November 15th. The plaintiff filed his lien on November 14th. Under the statute giving farm laborers a right to a lien on crops for labor performed in cultivating such crop, no lien attaches or is acquired until the claim

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for a lien is filed, as therein prescribed, in the office of the register of deeds. The statute gives the right to such lien, but none is acquired until such filing. It may be filed within 10 days from the termination of the labor contract. After such filing, the lien attaches from that date, but does relate back. At the time of the delivery of this flax, and during all the conversations wherein the plaintiff told the agent not to pay anybody until his claim was settled, the plaintiff had no lien, and no right whatever to the possession of the flax for himself. He was the custodian of the flax until delivered as the employe of the owner. The owner was alone then entitled to the possession. The delivery to the elevator company was made by the owner through the plaintiff. The plaintiff then had not the possession of it as and for himself. Nor had he any lien on it. The last of the flax was delivered on November 10th, without any promise or agreement that it should be kept separate, or not shipped to the general market. Under the usual course of business of elevator companies, it was immediately mingled with other flax, and soon shipped to market. The agent testified that this flax was shipped out of the state very soon after its receipt, and that there was not a bushel of the flax in the elevator at the time the lien was filed. If it had been shipped out of the state, or mingled with other flax in the elevator, before the lien was filed, the lien could not attach, and the plaintiff therefore never had the right to take possession of the flax under his lien while in the possession of the defendant, or at any other time. The defendant, therefore, is not guilty of converting the flax to its own use when covered by the palintiff's lien. It cannot, therefore, be held in damages for converting it to its uses. The lien must have attached to the flax before the defendant is liable. "It is well settled that no action for conversion can be maintained unless the plaintiff shows a special or general ownership in the property converted, and possession, or the legal right to immediate possession, at the time of the conversion." *Parker* v. *Bank*, 3 N. D. 87, 84 N. W. Rep. 313. The owner had not put this flax into plaintiff's possession as a recognition of his right to a lien thereon, but did so that he might sell the same for her. He delivered it at the elevator for her, and turned over to her the memoranda received from the elevator company. Until the lien was filed, the plaintiff could have no lien on the flax. The promise of the agent that he would settle with the plaintiff did not establish a lien in plaintiff's favor, and there was no agreement or request that the flax was to be held in the elevator until a lien was filed and the lien acquired. A conversion of the flax on which the palintiff had an existing lien has not been shown. The failure of proof is in matters of substance—the nonexistence of any lien on the flax. This defect is not such a one that it seems probable that a different showing can ever be made or made on another trial. There was no error in granting the motion for judgment.

The judgment is affirmed. All concur.

(92 N. W. Rep. 819.)

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WILLIAM ROSS *vs.* MORTON PAGE.

Specific Performance—Waiver of Conditions.

Page and Foley entered into a contract for the sale of land, to be paid for in the proceeds of wheat raised on the land. Balances due on the contract were to draw interest at 8 per cent., payable annually at the office of Morton & Co., where proceeds of wheat crop were also payable. It contained no provision for payment in money. It also provided that the vendee should continuously occupy and improve the land, and farm it in a manner particularly specified in the contract. The contract also contained a provision that no assignment thereof should be valid or binding without written consent from Page. The contract was assigned by Foley, the purchaser, to Ross, who made a payment on the contract in money not derived from crops raised on the land; and Ross went into possession by a tenant, who raised potatoes on the land. Ross tendered the balance due on the cantract in money. Page refused to accept the tender, saying that he did not recognize Ross in the transaction. *Held*, under the evidence narrated in the opinion, and for reasons given therein, that Page had waived all violations of the terms of the contract by retaining moneys paid by Ross to Morton & Co. under circumstances charging Page with notice of the conditions under which it was paid.

Assignment Given as Security no Defense.

The assignment showed on its face that it was made to secure advances, and it also contained a provision that authorized Page, in positive terms, to convey to Ross when the conditions of the contract were fully complied with. *Held*, that the fact that the assignment was given as security is no defense to Page, and does not entitle him to refuse to convey.

Demurrer—Defect of Parties.

The defendant demurred to the complaint because it did not state facts sufficient to constitute a cause of action. There was no demurrer on the ground that there was a defect of parties. The complaint showed on its face that the assignor of the contract to Ross was not a party to the action. *Held*, that the objection that the assignor was not a party was waived, and could not thereafter be raised by answer.

Appeal from district court, Cass county; *Pollock*, J.

Action by William Ross against Morton Page. Judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Resser (*Morrill & Engerud*, of counsel), for appellant.

J. W. Tilly and Robert M. Pollock, for respondent.

MORGAN, J. The plaintiff brings this action to compel the specific performance of a contract for the sale of 80 acres of land situated in Cass county. The complaint alleges that one Foley entered into a written contract with the defendant, Morton Page, by which Page agreed to sell him said land under the terms mentioned in said contract, and that Foley duly assigned said contract to the plaintiff; that all the provisions of such contract have been fully performed by said

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Foley in part, and by the plaintiff as to the balance; that the plaintiff has tendered to the defendant all sums due under such contract, and demanded a deed for such land pursuant to the provisions of the same; that such tender was refused; and that the plaintiff thereafter deposited the amount of such tender in the Fargo National Bank, subject to the defendant's order. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the same was overruled, and leave granted to serve an answer. The answer was served, and, after admitting the allegations of the complaint as to the contract, amount due, the tender, refusal to accept it, the demand for a deed, and the refusal to deliver it, denies generally the allegations of said complaint, and further alleges that there is a defect of parties defendant in the action, for the reason that Foley, the vendee and assignor of the contract, is not made a party; that said Foley did not assign said contract to the plaintiff absolutely, but as security only; and that the rights of all the parties cannot be adequately determined unless said Foley be made a party. The trial court made findings of fact and conclusions of law in favor of the plaintiff, and ordered that the defendant specifically perform the contract, by executing and delivering a deed of the land to the plaintiff. Judgment was duly entered on said findings, and the defendant appeals from such judgment, and requests a review of all the issues in this court, as provided by section 5630, Rev. Codes, under which the case was tried.

The contract on which the action is based contains the following provisions, among others usually found in contracts commonly called crop or farm contracts: "That the party of the second part hereby agrees with the said party of the first part as follows: That the premises above described are to be occupied and improved continuously by him, and he hereby agrees to farm said premises in a thoroughly first-class and farmerlike manner, according to the usual rules of husbandry, and to the best interest of the said party of the first part; in the year 1898, and prior to the 25th day of October, 1898, to plow back in a thoroughly first-class and farmerlike manner all the land now in stubble, and make the same ready for crop in the spring of 1899; in the year 1899 to sow the said land herein described to wheat, using therefor good, sound, clean seed wheat, free from mustard, Russian cactus, or other noxious weed seeds, and to keep the land clean and free from mustard, Russian cactus, French weed, or other noxious weed seeds, and to use due care and diligence in the selection of said seed wheat, and, if the same contains any smut, to properly bluestone, or otherwise use preventatives against smut in the seed wheat, in the spring, and before seeding." The contract then provides for the performance of the same conditions in reference to the seeding of the land during the year 1900, and all subsequent years, while the contract remains in force. The contract also contains this provision: "No assignment or pledge of this contract by the said party of the second part shall be valid or binding without

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the written consent of the party of the first part." The assignment from Foley to the plaintiff contains the following clauses: "And I hereby authorize and empower the said Morton Page to execute and deliver to the said William Ross, or his assigns, a deed of said described premises as soon as the conditions of said contract, or the payment of the purchase price thereof, has been fully complied with. * * * And provided further that, whereas the said William Ross has advanced to me certain moneys with which to make certain payments on said contract to the said Morton Page, this assignment is for the purpose of fully securing to the said William Ross the repayment of such moneys advanced, or any other moneys that he may so advance for or on account of said contract."

The defendant first insists that Foley, the assignor of the contract, was a necessary party in the action, and should have been brought in on an order from the court. It must be borne in mind that the defendant demurred to the complaint, and based his demurrer on the ground alone that the complaint did not state facts sufficient to constitute a cause of action. This ground of demurrer would not reach a defect of parties defendant. *Beyer* v. *Town of Crandon*, 78 Wis. 306; *Tennant* v. *Pfister*, 51 Cal. 511. Section 5267, Rev. Codes, provides that the objection that there is a defect of parties must be taken by demurrer, if the defect appears upon the face of the complaint. If it does not so appear upon the face of the complaint, it may be raised by answer. If the defect of parties appears upon the face of the complaint, and the objection thereto is not raised by a demurrer, the defendant shall be deemed to have waived the objection, except as to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action. Such is the accepted construction of the Codes of other states containing provisions like sections 5267 to 5272, inclusive, of the Revised Codes. See, also, *Sykes* v. *Bank*, 2 S. D. 242, 49 N. W. Rep. 1058, and cases collected in 15 Enc. Pl. & Prac. p. 750. Without admitting or deciding that the question of the defect of parties is properly to be determined on an appeal under section 5630, Rev. Codes, it conclusively appears that all objections to the complaint on that ground were waived by not demurring. The court did not, therefore, err in striking from the answer the allegation as to defect of parties, on motion duly made by the plaintiff.

The defendant contends that the judgment of the district court was erroneous and should be reversed on the evidence, and relies on the following propositions of law as sustaining such condition, which are given about as stated by him: (1) The contract could not be assigned or pledged without Page's consent; (2) Page had the right to insist on Foley's personal management of the farm, and insist on dealing with him alone; (3) the purchase price was not payable in full at any time at the option of the vendee; (4) Page could not be required to accept payment, or any other or different payment, of the purchase price, than that stipulated in the contract, but had the right to have the unpaid portion of the purchase price remain outstanding

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as an investment until paid in the manner contemplated by the contract; and (5) the assignment, on its face, was a pledge or mortgage, and did not confer absolute authority on Page to deliver the deed, in view of the fact that it was not an absolute assignment, and that evidence was not admissible in this action to show that it was an absolute assignment, as a matter of fact. It is urged that the contract could not be assigned without defendant's consent in writing, for two reasons: First, because the contract prohibited such assignment, in direct terms; second, because the contract shows by its terms that it was made in reliance on receiving Foley's personal services, skill, and judgment in the management and farming of the land; that a vendor has the absolute right to dictate as to the person to whom he shall sell, and who shall manage his property. On reviewing the evidence, we think it is conclusively shown that the defendant cannot now be heard to raise either of these objections to the giving of a deed by him. As questions of law, we shall not determine the questions as raised, as to do so is rendered unnecessary by the acts and conduct of the defendant in relation to the contract. To understand the ground of our decision, it will be necessary to state the evidence as to what was done by the parties since the contract was entered into, in relation to it. In 1899 Foley farmed the land, and on September 1, 1899, the sum of $806.35, was paid on the contract by him. The evidence does not show whether this sum was from the proceeds of wheat or other crop raised on the land, or not. During the year 1900 the crops on this land were a failure, and amounted to three or four hundred bushels of grain only. There was some flax grown on the land that year, as indirectly appears from the evidence. On October 2d, and before there had been an accounting between Mr. Page and Mr. Foley of the proceeds of the crops grown, and to be applied as payments on the contract, Mr. Foley assigned the contract to Mr. Ross, the plaintiff. At that time Foley and Ross computed the balance due on the contract, over and above a $1,000 mortgage that was on this land. This computation was made with a view of paying the amount due on the contract, less the amount of the mortgage. Mr. Ross intended to pay such sum, assume payment of the mortgage, and procure a deed from Mr. Page. The assignment was drawn by Mr. Tilley, an attorney who was acting for Ross and Foley; and he was given $786 by Mr. Ross, and instructed to pay the same to Mr. Page. Mr. Tilly went to the office of Morton & Co., at whose office payments on the contract were to be made, under the terms of the contract; Mr. Page being a member of such firm of Morton & Co. On arriving at the office of Morton & Co., neither Morton nor Page was present, but a clerk of the firm was present. Mr. Tilly stated the object of his call, and the clerk informed him that Mr. Morton had spoken to him concerning the matter. The clerk then talked with Mr. Morton over the telephone, as then stated by the clerk. While in the office, and before any money was paid, Mr. Tilly stated to the clerk that Foley had assigned the contract to Ross; that Ross was paying this money,

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which was largely in excess of the crop raised on this land that year; that he (Tilly) had computed the amount due on the contract, less the $1,000 mortgage; that Ross intended to assume payment of the mortgage, and procure a deed from Page, and had the $786 to pay to Page. All these matters, as stated to the clerk by Mr. Tilly, were repeated by the clerk over the telephone in Mr. Tilly's presence and hearing. At the close of the conversation over the telephone by the clerk, he informed Mr. Tilly that Mr. Morton directed him to receive the money. The clerk did receive it, and receipted for $786 on the contract. When this receipt was written on the contract, the assignment was attached to the duplicate copy of the contract in Mr. Foley's possession, and then in Mr. Tilley's possession. This payment of $786 was receipted for by the clerk as a payment on the contract, and has never been returned or offered to be returned to Ross. The clerk wrote the receipt for this $786 on the contract, and it is in the following words: "October 2, 1900. Received on the within contract $786.00, to be applied in part payment on the within contract. This indorsement is made in duplicate on the copies of the contract held by George Foley and Morton Page. [Signed] Morton Page, by Morton & Co., Agents. K." The clerk also had a duplicate copy of the contract there. While Mr. Tilly was in the office of Morton & Co., he demanded the release of the grain that had been raised on this land in 1900, and taken possession of by them, to apply on the contract; and the clerk gave an order that it be turned over and released to Ross. It is testified to that Page was told in August, 1901, of the assignment of the contract by Foley to Ross, but Page denies having been so told. In the year 1901, Ross rented this land to a person for a money rent. This person summer-fallowed some of the land, and raised a crop of potatoes on part of the land, the value of which was over $1,600. On September 14, 1901, and after the crop had been sold, Ross caused $1,229.25 to be tendered to Page. This sum represented the balance due on the contract. This sum was not realized out of the proceeds of the crop of 1901 on that land. Page refused to accept the tender, saying that he did not recognize Ross in the transaction at all. This sum was immediately deposited in a bank, subject to Page's order if a deed was deposited there in lieu of the money, and the money remains in the bank yet. Under these facts can it be said that Page can now, or could he when this tender was made, rightfully refuse to accept the money offered him, on the ground that Foley had assigned the contract contrary to its provisions, or on the ground that neither Foley nor Ross had carried out the provisions of the contract precisely as therein stipulated? The contract was a contract for the sale of land for a stipulated sum, to be realized out of wheat grown on the land. It contained no provision that the sum unpaid out of the crop could at any time be paid in money. It did not, in direct terms, prohibit such payment in money. Interest on the amount unpaid was to be paid in cash on the 1st day of November of each year, as expressed in one

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clause of the contract. The contract also, in the clause providing that Page may enter upon and take possession of the land in case of the nonperformance of the terms of the contract, provides that Page may retain all sums of money that may have been received as rental of the land. But consideration of that phase of the case becomes unnecessary, as the evidence shows that Page has assented to payment on the contract by Ross in money known to him not to have come out of any crop grown on this land. Under the contract, payment of the price of the land and interest thereon was to be made at the office of Morton & Co. This provision says: "The said party of the second part further agrees to pay as compensation for the land aforesaid, * * * from the crops grown on the land, * * * the sum of ———, with interest; * * * said interest to be paid annually in cash at the office of Morton & Company." The contract also provided that Page could, at his option, sell the crops after November 1st of each year, if not previously sold by Foley. Under these last provisions of the contract, the office of Morton & Co. must be deemed to have been the place where payments under the contract were to be made. Mr. Page was a witness at the trial, and made no denial of the fact that Morton & Co. were his agents for purposes of receiving payments on said contract, and did not deny their authority to receive the money, or to act for him on matters pertaining to the contract. Payments were there received with knowledge that they were made by Ross with money not derived from the land, and with knowledge of the fact that Ross was assignee of the contract. Mr. Tilly testifies that he told Page in August, after this payment was made, that Ross held the contract under the assignment from Foley. Page denies this by saying that he has no recollection of having been told so by Tilly. Under these circumstances, we hold that Page holds the money charged with knowledge of the facts disclosed when the payment was made to his agents, and that what was said and done at the time of payment is competent evidence. He cannot retain this money, and then say that he will not recognize Ross in the transaction. He has waived the departure from the stipulations of the contract that the land was to be paid for from proceeds of crops of wheat raised on the land, and also the provision against assignment, and cannot be heard to allege that he entered into the contract relying on the personal skill and services of Foley in farming the land, and cannot be heard to say that, until the land was paid for in crops, he may insist that the unpaid balance of the price shall draw 8 per cent. interest until fully paid out of the crop. It would be a most harsh and inequitable construction of the contract to hold that Page still retains the right to insist on a technical compliance with all the provisions of the contract, in view of the fact that he retains the money paid by Ross relying on an assignment of the contract; and Page is chargeable with notice that, when the money was paid by Ross, he did so relying on the assignment. The defendant has not treated the contract as simply an interest-bearing investment un-

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less payments are made in wheat. He accepted money payments, knowing that the contract had not been carried out specifically as provided therein. Upon first being informed that the contract had been assigned, and that other crops than wheat were being raised on the land, had he promptly objected, and refused to in any way accept the proceeds or assent to payments or to the assignment, and tendered back the money paid by Ross, another and different question would be presented. But he chose not to object or in any way indicate that he would not abide by the action of Foley in assigning the contract, or in the actions of Foley and Ross in not carrying out the contract in the manner provided in it. Upon receiving notice of violations of the terms of the contract, he should promptly have asserted his rights under the contract, in order that no one might be misled by his silence to their prejudice, by payment of money for doing work on the land, or in any other way. He waited nearly one year after the $786 was paid by Ross before intimating in any way that he would not recognize Ross in the transaction. He was told in August, 1901, that Foley had assigned the contract to Ross and did not object or take any action. He has waived all deviations from the provisions of the contract. *Fargusson* v. *Talcott*, 7 N. D. 183, 73 N. W. Rep. 207; *Boyum* v. *Johnson*, 8 N. D. 306, 79 N. W. Rep. 149; *O'Connor* v. *Hughes* (Minn.) 29 N. W. Rep. 152. In the summer of 1901 he knew that potatoes were being raised on this land by Ross' tenant. He made no objection, but demanded the rent from the tenant; and, upon being informed that Ross had been paid the rent, Page said that he would collect it again, and, unless paid, he would come and dig the potatoes. To no one did he object that the crop raised was not wheat. He wanted the rent, without regard to what crop was raised on the land.

It is claimed that the assignment was made in bad faith, and with intent to prevent Morton & Co. from collecting a judgment out of this land, which judgment was recovered by Morton & Co. against Foley for commissions on sales of real estate, including the land in suit. We find that the evidence sustains a contrary conclusion. The judgment had not been obtained, nor the action commenced, when the assignment was made. That action was tried in 1901. On that trial Ross was a witness, and it is claimed that his testimony in that case conflicts with his testimony in this case. His testimony in this case is corroborated in every material matter as to the issues in this case. We do not think that his testimony in this case has been shown to be false by showing contrary statements on the other trial as to the land involved in this case. He explained such contrary statements as to the land involved in this suit, and we are not convinced of his bad faith in this transaction. Page has received his purchase price in full, or it has been tendered, with accrued interest. It does not seem that he can justly claim more.

It is next claimed that Page was justified in refusing to comply with the demand for a deed, for the reason that the assignment showed on its face that it was made simply as security for advances

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made to Foley; that, if Page had given a deed on demand, Foley could hold him responsible for so doing, as a violation of the contract with him. As already seen, the assignment, in direct language, authorized Page to deed the land to Ross after compliance with the contact. The language authorizing Page to convey to Ross was positive and explicit. Such authority, following, as it does, a clause of the assignment in direct terms selling, assigning and transferring the contract to Ross, would protect Page from any action by Foley if Page shall convey the land to Ross. If Foley has any interest in the conveyance or in the land, and Page deeds to Ross, Ross would hold such interest subject to Foley's claim, and must account therefor. Foley would be subrogated, so far as his interest in the land is concerned, in place of Ross, or Ross must account to him in some other manner. In any view taken of the assignment, whether it be absolute or conditional, the provision that Page was, in absolute terms, empowered to deed to Ross on performance of the conditions of the contract, would protect Page in so doing; and in no event can Foley hold Page responsible in damages for doing just what the assignment authorizes him to do. So far, therefore, as the question of the nature of the assignment is concerned, it is a matter to be settled between Foley and Ross, and does not concern the interests of Page at all.

It follows that the judgment is affirmed. All concur.

(92 N. W. Rep. 822.)

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J. I. CASE THRESHING MACHINE COMPANY *vs.* E. L. EBBIGHAUSEN.

Contracts—Alteration not Materia .

A writen order for a threshing machine contained no provision for security on growing crops or on a secondhand engine. The machine company refused to deliver the machine unless such security was given. In order to get the possession of the machine for imediate use, the defendants gave such security, and the machine was delivered to the defendants. The order for the machine, as exhibited at the trial, had been changed so as to contain a provision that security should be given on such crops and engine. It is not shown when the alteration was made, nor by whom made. *Held*, that the alteration was not a material one, in view of the fact that the defendants had given such security, and received the machine uninfluenced by the contents of the order as changed.

Agent's Acts not a Waiver.

The order for the machine provided that, in case the machine failed to work well, the company should be notified, at Racine, Wis., and the agent of whom the purchase was made should also be notified. The company was not notified at the Racine office in any manner, but a general agent, who had no authority to waive any of the provisions of the contract, was notified by telephone that the machine would not work well,, and an expert was sent by him, pursuant to request, to remedy defects. The agent from whom the machine was purchased was also notified. *Held*, that such general agent's acts, independent of any orders or communications from the plaintiff, was not a waiver of the terms of the order requiring the company to be notified at the home office.

Appeal from District Court, Walsh County; *Kneeshaw*, J.

Action by the J. I. Case Threshing Machine Company against George W. Ebbighausen and E. L. Ebbighausen. Judgment for defendants, and plaintiff appeals. Reversed.

Turner & Lee, for appellant.

Spencer & Sinkler, for respondents.

MORGAN, J. This action is brought to foreclose a chattel mortgage given to secure the purchase price of a threshing machine, consisting of a separator, stacker, and weigher; said price being represented by three promissory notes, dated on August 15, 1899, of the aggregate sum of $700. The separator and other attachments were ordered by the defendants from the plaintiff in June, 1899, by a written order containing the following provisions, viz: "Said machinery is purchased upon and subject to the following mutual and independent conditions, namely: It is warranted to be made of good material, and durable, with care, to do as good work as any made in the United States, if properly operated by competent persons, and the printed rules and directions of the manufacturers intelligently followed. If purchasers, by so doing, after trial of ten days, are unable to make the same operate well, written notice shall at once be given to J. I. Case T. M. Company, at Racine, Wis., and also to the

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agent from whom purchased, stating wherein it fails to fulfill the warranty, and reasonable time shall be given to said company to send a competent person to remedy the difficulty; the purchaser rendering necessary and friendly assistance; said company reserving the right to replace any defective part or parts; and, if then the machinery cannot be made to fill the warranty, the part that fails is to be returned by the purchaser, free of charge, to the place where received, and another substituted therefor, that shall fill the warranty, or the notes and money for such part immediately returned, and no further claim on the company. Failure so to make such trial or to give such notices, in any respect, shall be conclusive evidence of due fulfillment of warranty on the part of said company, and that the machinery is satisfactory to the purchasers. * * * Failure to fully settle on delivery as above promised, or to comply with any of the conditions of this warranty on purchaser's part, or any change in the terms of this warranty by any person whomsoever, agent or otherwise, by addition, erasure, or waiver, discharges the company from all liability whatever." The following provisions were indorsed on the margin of the order when it was signed: "Mechanics and experts are not agents. They are not authorized to bind the company by any act, contract, or statement. * * * Agents have no authority to waive, alter, or enlarge this contract, or to make any new or substituted or different contract or warranty." The machine was delivered pursuant to such order, and the notes and mortgage executed and delivered for the purchase price, on August 15, 1899. About August 30th the machine was put in operation, and threshing commenced. It did not work well, and the defendants notified the agent from whom it was purchased, by letter, that the machine did not work well, and asked that an expert be sent, and at another time made a similar request by telephone to the same agent; and the expert came, and attempted to put the separator in working order. The result of this attempt to put the machine in order is a disputed fact, under the testimony of the expert and the defendants. The expert says that they refused to allow him a thorough opportunity to put it into successful operation. The defendants say that he failed to make it work, and gave it up, and admitted that neither he nor any one else could make it work well. The defendants then immediately caused the separator and attachments to be hauled to Grafton, and left at the place where they were delivered to them. This was in the evening, and on the following morning the plaintiff's local agent at Grafton was told by one of the defendants that the machine had been returned. On the evening of the return of the machine, the expert had a conversation with Mr. Clary, general agent of the plaintiff at Fargo, in regard to the expert's attempt to make the machine work; and during that conversation Mr. Clary asked the expert to call one of the defendants to the telephone, as he wished to talk with him. This was done, and the conversation had in which the defendants informed Mr. Clary they had returned the machine into town, and

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demanded their notes back. The trial in the district court resulted in favor of the defendants. The plaintiff appeals from the judgment entered in district court after a trial to the court under section 5630, Rev. Codes, and requests a review of all the issues involved in the case.

There is a preliminary question to be determined in this case, before considering the merits of the defense as set forth in the answer. When the order for this machine was signed, it did not contain the provision found therein at the trial,—that the defendants were to give security, before the machine was delivered to them, on 80 acres of growing crops and on a secondhand engine owned by the defendants. The order, as signed, provided for security on the machinery purchased, only, and it was changed by inserting a provision for security on crops and on an engine. It is claimed that such alteration is a material one, and renders the order void for all purposes, and that it cannot be offered in evidence in rebuttal of the evidence of the defendants upon matters not relating at all to the security. The order was given June 8, 1899. The notes and mortgage, with security, were given August 15, 1899. When the notes and mortgage were given, the defendants objected to giving additional security; but plaintiff insisted, and refused to deliver the machine unless such security was given. There was then nothing said by any of the parties in regard to the fact as to whether the order for the machine provided for such security or not. The record does not show whether the order then contained the provision for such security or not. It is not shown when this provision was inserted in the order, or whether it was inserted before or after the mortgage was given; nor is it shown by whom the provision was inserted. Without any reference being made to the order not containing such provision, the defendants gave the mortgage, with such addtional security on the crop and engine. They gave the security, as stated by one of them, "in order to get the machine. * * * We finally gave the security on the same secondhand engine and the same crop as is now described in the order." The action is not based on such order, nor is it mentioned in the complaint or answer. The provisions of the order are pleaded in the answer as grounds for relief from the mortgage, but no allegation whatever is therein set forth that such order had been altered since its execution. The defendants had a copy of such order in their possession during all the time, and the insertion of the provision for crop security in no way prejudiced them, in view of their action in voluntarily giving such security without reference to the provisions of the original order. Under such circumstances, the alteration was an immaterial one, whether made before or after the giving of the security. The contract was an executed one when the machine was delivered, and the notes and mortgage given therefor. The alteration in no way affected the transaction, in view of the fact of the giving of security and the delivery of the machine. If the defendants were aware of this alteration, they have, by their conduct, waived it; and, whether they knew of it or not, the alteration is not

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a material one, under the evidence, in view of the conduct of the defendants in giving the security, uninfluenced by the fact that a change was at some time made in the order. The order was properly offered in evidence, under the circumstances.

The answer in this case alleges that there was a breach of the warranty that the machine would do good work, and that, after giving the machine a fair trial, the defendants returned it to the place where it was delivered to them, and thereafter demanded a return of the notes given for its price, and by such acts rescinded the contract. It is not alleged in the answer, nor proved or claimed, that any written notice or any notice at all was given to the company at Racine, Wis., of the failure of the machine to work, or of the particulars wherein it failed to work. No notice of any kind whatever was served on the company at Racine. There was a total absence of compliance with the provisions of the order requiring such notice. The claim is made that such notice was unnecessary, as the same was waived by the plaintiff. A statement of the evidence bearing on that question therefore becomes necessary. The trial of the machine commenced on August 30th, and it would not work well. The defendants then wrote one Burnett, the agent of whom the machine was purchased, residing at Grand Forks, stating that the machine would not work properly, and asking him to send an expert. The expert did not come immediately, and on the 6th or 7th of September the defendants telephoned Burnett that, if an expert was not sent Friday morning, the machine would be returned. Neither the letter nor the conversation over the telephone disclosed wherein the machine did not work properly. The expert came Friday morning, the 8th; and, as said before, the result of his efforts to make the machine work properly is a matter of dispute. Claiming that it failed to work properly, and that the expert admitted that it could not be made to work properly, the defendants returned the machine to Grafton, and notified Mr. Jacobson, the local agent, of having done so; and, in a conversation with Mr. Clary over the telephone, he was informed of the return of the machine, and of their refusal to accept it, or to further allow any attempts to make it work. During the trial of the machine the defendants had telephoned Mr. Clary, asking him to send some extras, and afterwards to send an expert, and it was Mr. Clary that sent the expert who tried to make the machine work satisfactorily. Mr. Clary is the general agent of the plaintiff company in North Dakota, and had charge of the company's agency at Fargo. Although called the "general agent of the company in North Dakota," his duties and powers were limited, and he was subject to orders, and had no authority to act, except under directions from headquarters, at Racine, in charge of the general officers, and particularly a general manager at that place. He was not a general agent, with general powers to act for the company. He had no general authority to make sales or to accept orders, nor to vary contracts of sale, nor to waive any of the provisions of the printed orders for machines or contracts of sale. The record contains objections to questions propounded to the gen-

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eral officers of the company, on their cross-examination, while giving their depositions, taken on behalf of the defendants. These objections pertain to questions and answers as to the powers and duties of Mr. Clary. The defendants had examined the witnesses as to such powers in the direct examinations. The objections are made on the ground that Mr. Clary's real authority cannot be shown, when he has been held out to the world as a general agent. There is no evidence that the company has held him out to the public as an agent with general powers. The very contract in suit states that no agent has a right to waive any of the provisions of the contract, and the order was made on the printed form, which advised the defendants that no person or agent had authority to change or waive its provisions. *Reeves* v. *Corrigan*, 3 N. D. 425, 57 N. W. Rep. 80.

With no claim made that a written notice, or notice of any kind, was given to the company at Racine, it remains to be decided whether the provisions of the order requiring such notice became unnecessary, in view of Mr. Clary's conduct in sending an expert to repair the machine on request made direct to him. In this court, similar questions have been before the court in two instances. In *Fahey* v. *Machine Co.*, 3 N. D. 220, 55 N. W. Rep. 580, 44 Am. St. Rep. 554, as in this case, there was no pretense of having sent the notice required to the company, and the claim was made that the necessity of giving the notice had been waived. On the question of the necessity of complying with the requirements of the contract, the court said: "To recover, it was incumbent on plaintiff to show that he had performed all the conditions precedent of the warranty to be performed on his part. This he did not do. Mere breach of the warranty did not entitle him to rely upon its promises. He must have taken action to hold the defendant to its warranty after its breach. It is only upon giving written notice to the agent from whom he received the machine, and also to the Esterley Harvester Machine Company, at Whitewater, Wisconsin, that he is allowed to avail himself of the warranty." Upon the question of waiver of the notice, the court said: "The waiver of notice must come from some agent having power to waive it." In *Manufacturing Co.* v. *Lincoln*, 4 N. D. 410, 61 N. W. Rep. 145, the same question was considered and discussed; but it was there held that inasmuch as a notice was addressed to the machine company, but at a place where the company had an office, instead of at the main office, where the contract provided it should be sent, it was a question properly submitted to the jury, to determine whether the notice was received and acted upon by the company at the place provided for in the contract. While this case cannot be cited as a precedent on the question involved, still what is said therein is applicable to the case at bar. In that case it is said: "If the local agents, without authority to do so, and without the approval of the managing office, sent out certain experts of their own selection to fix the machine, we are quite clear that such action could not be construed as a waiver of the stipulation as to giving notice." In this

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case no claim is made that any attempt to notify the company at Racine was made, and the record contains no inference or intimation that the company was in any way notified at Racine of the defects claimed to exist. It is true, in general, that notice to an agent is notice to the principal; but in this case notice to the company at a particular place in a particular manner is made a condition precedent to the right to return the machine, and all other modes of notice to the agent are not effectual, under the general principle stated, in the absence of a showing that the company did receive notice, or waived it, or ratified the acts of the agent. A similar question was before the supreme court of Minnesota in *Nichols* v. *Knowles*, 18 N. W. Rep. 413. The court said: "In other words, the acceptance of the oral notice by Hickman, by his promise, without objection, to come and fix the machine, is the waiver contended for. In our opinion, there is a fatal objection to the defendants' proposition. There is no evidence whatever tending to show that Hickman was authorized to receive the notice provided for in the contract of warranty, for or in behalf of the plaintiffs; and no evidence whatever to show that he had the least authority to waive it, nor that the notice which was given to him was ever accepted or acted upon by plaintiffs, or his action in the premises ratified by them. The notice given to Hickman was therefore wholly ineffectual to bind the plaintiffs." In *Irle* v. *Nichols-Shepard Co.*, 89 Ill. App. 619, the court said: "Appellants repeatedly attempted to get before the jury proof that the machine would not work satisfactorily. They did not pretend to have notified appellee by registered letter at Battle Creek, Michigan, of the failure of the machinery to fulfill the warranty, as required by the contract, but contended that appellee acted upon such notice as was given, and thereby waived notice by registered letter. The difficulty with the contention as to waiver is that there was no competent proof of any notice whatever, and no proof that persons who came to examine the machinery were sent by appellee. The copy of the letter to appellee, dated August 6th, was offered in evidence; but, as no notice to produce the original had been given, the court properly sustained an objection to it. Three men did at different times visit the machine, and attempt to remedy the alleged defect; but they seem to have done so at the instance of one C. J. Gottshall, a general state agent of appellee, residing in Bloomington. It nowhere appears that they were sent by appellee, or that Gottshall had any instructions from appellee to send them. Gottshall testified that his duties as general agent required him to superintend local agents and companies selling appellee's machinery in the state, but that he had nothing to do with machinery after being sold. The notice sent by appellants to him therefor could in no sense be regarded as a notice to appellee, and any action taken by him under such notice could not affect appellee, unless recognized by it. The power of an agent to bind a corporation is limited to the scope of his agency." In *Trapp* v. *New Birdsall Co.* (Wis.) 85 N. W. Rep. 478, the court said: "There is evidence that one of appellant's agents visited the machine

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after the notice is claimed to have been given, but there is no evidence that he was sent by appellant, or that appellant had knowledge of his conduct. The mere fact that the agent so acted did not bind the appellant. The contract expressly provided that no agent should possess authority to add to it in any way, or to waive any of its provisions." See, also, *Aultman & Taylor Co.* v. *Gunderson,* 6 S. D. 226, 60 N. W. Rep. 859, 55 Am. St. Rep. 837. In that case written notice was given to the company at the home office and to a local agent, but not to the agent from whom the machine was purchased, and an agent of the company visited the machine and endeavored to make it work after such notices were given. The rule seems to be settled that if the seller acts on or recognizes a defective notice, or if an agent with authority to act in that particular matter, acts without the notice being given just as prescribed, the giving of the notice in the way provided in the contract is waived. But the company must act through an agent having authority, and acts of an agent without general authority, or without special authority in the particular case, are not binding on the company, and the provisions of the contract as to giving notice are not waived, and cannot be thus waived. The agent, Clary, had no authority to waive the provisions of the contract. The contract so stated. He did not act under authority from the company, and the company has not ratified his acts. The terms of the warranty have not been complied with. There was therefore no rescission of the contract by the defendants. The contract pointed out the way to rescind it. It pointed out the penalty of failure to do so. A compliance with the contract or order as to notice imposed no hard or difficult task. The defendants should have done as the contract provided, or dealt with authorized agents. The contract is explicit, and it is not for the courts to render its terms inoperative, unless conditions agreed upon have not been performed, or are waived by the parties or authorized agents. The defendants urge that the case at bar is ruled by *Thresher Co.* v. *Kennedy* (Ind. App.) 34 N. E. Rep. 856, and *Machine Co.* v. *Mann* (Kan.) 22 Pac. Rep. 417. In the first case notice was given to the general agent, and he and the defendants notified the company in writing that the machine would not work; and, further, a payment was made on the notes, and sent to the company, with a statement that the machine would not work, and that such payment was made on condition that the machine be made to work, and the company retained such money. Further, the agent in that case had authority to make sales, and the court held the provisions of the contract waived by an agent having authority to do so. In the other case there was no evidence that there was any restriction on the powers of the agent, and there was evidence that he, as manager of a branch office, had full powers to sell machines and receive those returned as unsatisfactory, and to refund what might have been paid on them. Under such circumstances, the court held that he had power to waive the provisions of the contract as to notice. Neither of these cases is in point.

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The judgment is reversed, and the district court directed to order judgment in favor of the plaintiff in accordance with the demand of the complaint. All concur.

(92 N. W. Rep. 826.)

OTTO BUCHOLZ *vs.* ARTHUR E. LEADBETTER *et al.*

Cancellation of Contract—Notice.

Action to recover possession and to quiet title as against the defendants. B. was the owner of the fee of the land in question, and on October 2, 1899, entered into a written agreemnt to sell the same to plaintiff. On March 16, 1901, pursuant to certain provisions in the contract, a notice was sent to the plaintiff in behalf of B., purporting to cancel and annul the contract on the ground of alleged defaults of the plaintiff thereunder. Evidence examined, and *held*, that the notice of cancellation did not operate to annul the plaintiff's contract of purchase.

Wrongful Possession of Land.

The defendant Arthur E. Leadbetter served an answer to the complaint, wherein he disclaimed any title or right in or to the land, or right to the possession thereof. The defendant Anna M. Leadbetter entered into a contract with B. on March 22, 1901, whereby she agreed to purchase the land from B., and under which she went into possession of the land at that date, without the knowledge or consent of the plaintiff. Evidence examined, and *held*, that she bought with knowledge of the prior rights of the plaintiff as purchaser of the land, and hence wrongfully took possession, and holds possession unlawfully as against the plaintiff.

Judgment Quieting Title Affirmed.

The judgment of the trial court quieting title in the plaintiff and awarding the plaintiff possession is accordingly affirmed.

Appeal from District Court, Cass county; *Pollock*, J.

Action by Otto Buchholz against Arthur E. Leadbetter and Anna Leadbetter. Judgment for plaintiff, and defendants appeal. Affirmed.

M. A. Hildreth, for appellants.

Benton, Lovell & Holt, for respondent.

WALLIN, C. J. This is an action to recover the possession of a tract of land in Cass county, and to quiet the title of said land as between the plaintiff and the defendants. The action was tried without a jury, and the district court, by its judgment, quieted the title in the plaintiff, and decreed that plaintiff should recover the possession. Defendants appeal from the judgment, and the entire case is before this court for trial anew.

There is little dispute in the evidence, and the facts which we deem to be decisive of the result in this court are practically uncontroverted.

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These facts are as follows: One Joseph M. Bassett of Worcester, Mass., is, and at all times in question was, the owner of the legal title to the land in dispute, and at all times in question one George Phelps, an attorney at law, residing at Fargo, N. D., was the authorized agent of said Joseph M. Bassett, and acted as such in all of the transactions relating to the land which appear in this record. It is undisputed that a written contract of sale of the land between Joseph M. Bassett and the plaintiff was entered into on the 2d day of October, 1899, whereby the plaintiff purchased the land on the so-called "crop payment plan," for an agreed consideration of $10,000. This contract need not be set out at length. It will suffice to say that by its terms the plaintiff, among other things, agreed to perform certain obligations set out in the instrument as conditions precedent to acquiring the fee title. Among such obligations are the following: To pay interest annually on the unpaid purchase price until the whole should be paid; to farm the land in the manner described in the writing; to deliver at an elevator each year one-half of the crops raised on the land, and to take elevator tickets therefor in the name of said Joseph M. Bassett, and deliver the same to Bassett or his agent. It was further stipulated that the plaintiff should not sell any right in the land arising under said agreement without the written consent of said Bassett. It was further agreed that the proceeds of said one-half of the crops so agreed to be delivered should be applied by Bassett—First, in extinguishing unpaid taxes on the land; and, second, in payment of accrued interest; and the balance, if any, was to go to reduce the principal sum due on the purchase money. The writing also authorized the plaintiff to take possession of the land. The writing embraced the following provisions: "Said second party agrees that, in default of the performance of the covenants, terms, and conditions of this contract by him to be performed, or default in the payment of either or any of the said sums of money hereinbefore and by the terms of this contract agreed to be paid, or the interest thereon, or in the default of the payment of said taxes, or any other sum of money hereinbefore agreed to be paid, the principal sum of ten thousand ($10,000), or so much thereof as shall remain unpaid, and interest, shall immediately become due and payable, and may be collected by foreclosure of this contract or otherwise; or, at his election, said first party may at any time upon such default, or at any time thereafter, and upon the failure of said second party to make such payments, or any of them, punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid strictly and literally without failure or default, declare this contract terminated and forfeited, and may enter and take possession of said land, retaining all sums that have been paid under this contract as rent of said premises to the date of such declaration; it being agreed and understood that time is, and it is hereby expressly declared to be, of the essence of this contract. A notice of the forfeiture and termination of this

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contract deposited in any United States post office directed to said second party at Wheatland, North Dakota, with postage thereon prepaid, shall be sufficient declaration of such forfeiture and termination, and shall fully determine this contract, and the same shall thereupon become void, and all rights of the second party hereunder shall utterly cease and determine, and the said premises herein described, and all rights of possession thereto, shall immediately revert to and revest in said first party as absolutely and fully as though this contract had never been made."

The complaint alleges, and the testimony shows, that in the winter of 1899 the plaintiff entered into negotiations with the defendant, Arthur E. Leadbetter, looking to a sale of the land to said defendant, which negotiations resulted in drawing and signing a contract of sale, dated April 7, 1900, whereby the plaintiff agreed to sell the land to Arthur E. Leadbetter upon substantially the same terms as those upon which the plaintiff purchased the land, but at an enhanced price. But plaintiff alleges and shows by testimony that the contract dated April 7, 1900, was never delivered to defendant, Arthur E. Leadbetter, and that the contract was not delivered because of the default of said defendant, who failed to comply with the conditions upon which it was agreed that the same should be delivered, viz., because said defendant failed and neglected to pay over to the plaintiff a certain sum of money as a first payment on the land. But the contract of April 7th has become immaterial in deciding this case, for the reason that the defendant, by his answer, claims no rights under said contract, and explicitly disclaims having any right, title, or interest in the land in dispute, and especially denies that he is in the possession of the land.

The defendant Anna M. Leadbetter answered the complaint, and denied that the plaintiff is the equitable owner of the land, and alleged that the plaintiff's rights in the land had been forfeited and canceled at a date long prior to the commencement of the action; and further alleged that she was the equitable owner of the land, and that she acquired her rights in the land under a certain contract of purchase dated March 22, 1901, a copy of which contract is annexed to and made a part of her answer. The fact of the execution and delivery of the last-mentioned contract is conceded, and it is under this contract that Anna M. Leadbetter claims to have taken possession of the land in April, 1901, and to have remained in possession ever since. The terms of the said last-mentioned contract substantially conform to those in the other two contracts of sale above referred to. The evidence shows that Arthur E. Leadbetter moved upon the land in April, 1900, and that he farmed the land that year, and delivered to said Bassett or his agent the one-half part of all the crops raised that year on the land; but the trial court found from the evidence—and, we think, properly found—that such possession and holding of Arthur E. Leadbetter was unauthorized and wrongful. Nevertheless, it appears that such holding was acquiesced in by the agent of Bassett, and that said agent accepted the crop payment of 1899, and applied the

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same as a credit upon the amount due from the plaintiff under his contract of purchase. The testimony shows that Mr. Phelps wrote and plaintiff received the following letters:

"Dec. 26, 1900. Otto Buchholz, Esq., Glyndon, Minn.—Dear Sir: It is over three weeks since I sent you statement of the amount received from the crop on the land you bought from Mr. Bassett, Sec. 13—141—53. There is a balance on this year's interest, which must be paid. That is all I shall ask for this year, but I shall insist on its being paid, and that at once. If you had gone on and farmed the land yourself, there would have been no difficulty about your making this payment on the place. You undertook to make some money by a resale, and Mr. Bassett feels that he cannot be expected to suffer by any mistakes in judgment which you may have made. Bring in the money and fix this up at once."

"January 29th, 1901. Otto Buchholz, Esq., Glyndon, Minn.—Dear Sir: This is the day that you and Leadbetter were to meet here to fix up matters regarding Sec. 13, Empire township. Neither of you are here. Why not? Your letter of the 21st inst. to Mr. Bassett is before me, and a copy of his reply. Let me tell you. You have failed to live up to your contract. Mr. Bassett can and will cancel it, unless you pay the balance of interest and 1900 taxes before Feby. 10th. He will also take the necessary steps to get possession of the land before seeding. If you want the land, come in and settle the interest and pay the taxes. If you don't do so by Feby. 10th, the contract will be canceled, and steps taken at once to get possession of the farm before seeding. This is the last call. Come in with your money or quit."

These letters were followed by a so-called "notice of cancellation," which is as follows: "Mar. 16th, 1901. Otto Buchholz, Esq., Wheatland, N. D.—Dear Sir: You are hereby notified that by reason of your failure to comply with the terms of a certain contract in writing dated October 2nd, 1899, entered into between yourself and Joseph M. Bassett for the sale by said Bassett to you of section thirteen (13), in township one hundred forty-one (141) north, of range fifty-three (53) west, in Cass county, North Dakota, the said Bassett has elected to declare, and hereby does declare, the said contract forfeited and terminated. The respects in which you have failed to comply with the terms and conditions of said contract, and upon which this declaration of forfeiture is made, are as follows, to-wit: First. Failure to enter into possession of said premises, and to plow and prepare the same for crop in the season of 1900. Second. Failure to furnish at your own expense all seed grain, stock, machinery, and labor necessary and essential to carry on and work said land in the season of 1900. Third. Failure to seed such land at such a time in the spring of 1900 as would insure the best results. Fourth. Failure to plow back land in the fall of 1900, and to fit the same for crop the succeeding spring. Fifth. Failure to break, during the season of 1900, that portion of said tract unbroken at the date of said contract. Sixth. Failure to harvest and thresh the grain grown on said

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premises in the season of 1900. Seventh. Failure to deliver to said Bassett or his authorized agent, George H. Phelps, at any elevator, one-half of all grain of every description grown on said premises during the season of 1900, as provided in said contract. Eighth. Failure to protect the growing timber on said premises as provided in said contract. Ninth. Failure to pay taxes on said premises assessed for the year 1900. For the foregoing reasons said contract is hereby declared determined and void, and all rights which you may have acquired thereunder ceased and determined, and possession of said premises is hereby demanded."

It is convenient to inquire at this point whether this notice of March 16, 1901, operated in law to terminate and forfeit the plaintiff's contract of purchase. That is was intended by its writer to have that effect is clear, not only from its language, but from the fact that only a few days after it was sent, viz., on March 22, 1901, a new contract was entered into, whereby Joseph M. Bassett, by his agent, undertook to sell the land in dispute to the defendant Anna M. Leadbetter. Reverting to the notice of cancellation, it appears that the same embraced nine grounds or reasons, which were respectively advanced as justifying the cancellation of the contract. None of the grounds stated had reference to the nonpayment of interest. All of the grounds, except the ninth and last, referred either to the land, or to the manner of cultivating or protecting the same, or to the crop payment, and all of the grounds dealt with the year 1900. As to these grounds Mr. Phelps testified as a witness, and his testimony, as we construe it, is to the effect that the plaintiff omitted to personally go upon the land and cultivate the same in 1900, and that he omitted to individually turn over one-half the crop, etc. But Mr. Phelps did not testify or claim that the land was not cropped in fact in 1900, or that one-half of the crop was not turned over to Bassett, as required by plaintiff's contract of purchase. Such is not the contention. Upon such a state of facts we quite agree with the trial court in its holding that all of the grounds or reasons of forfeiture, except the last, which will be discussed separately, are insufficient, and furnish no valid reason in the law for forfeiting the contract. It has been seen that Mr. Phelps, as the agent of Bassett, was at all times advised that Arthur E. Leadbetter was farming the land in 1900, and, well knowing this fact, the crop or its proceeds belonging to Bassett was received by him, and applied upon the plaintiff's contract. Upon this point Mr. Phelps testified as follows, referring to the crop of 1900: "After the threshing was done in the fall, I commenced urging him to make payments on the contract,—that is, Mr. Buchholz. I recognized no person but Mr. Buchholz during the time that Buchholz was in possession of the land, as I understood it." This can only mean that while Arthur E. Leadbetter was, to the knowledge of Phelps, in fact farming the land in the year 1900, Mr. Phelps understood that Buchholz was in legal possession, and was engaged, through Leadbetter, in executing his contract of purchase. But another fact, we think, militates strongly against the theory that the

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notice of March 16th was effectual as a cancellation of the plaintiff's purchase contract. The letter of December 26, 1900, makes reference to a "statement of the amount received from the crop on the land," referring to the crop of 1900, and also contains a demand of interest for 1900, coupled with a statement as follows: "That is all I shall ask for this year." This letter was written at the close of the year 1900, and after Bassett's share of the crops had been received by him, and the proceeds thereof credited upon plaintiff's contract of purchase. Except as to the item of an unpaid balance of interest, the letter was silent as to any defaults or omissions of duty on plaintiff's part arising under the contract of purchase. In this letter no mention is made of either or any of the nine grounds of forfeiture set forth in the notice of cancellation. In fact, the letter of December 26th, when fairly construed, imports that Basset had no grounds of complaint against the plaintiff in the premises, except as to the one matter of interest. Referring to the unpaid interest, the letter declares, "That is all I shall ask for this year." As we construe the entire letter, its meaning is that on December 26, 1900, Basset had no grounds except the matter of interest upon which he could cancel plaintiff's contract, or, if such grounds existed, that Bassett did not desire at that time to insist upon any other grounds, but, on the contrary, would waive the same; and it is our opinion that the plaintiff might well assume, from the terms of this letter, that Basset intended not to press any claims of forfeiture, if any he had, other than the one claim for interest. The notice of cancellation was not mailed until March 16, 1901. This date was approximately the date at which farming operations for the season of 1901 would begin, and this date also was from four to six months after all of the alleged defaults in 1900 occurred, if in fact any did occur. We think this notice came too late to accomplish the purpose which was sought to be accomplished by it. Courts of equity regard all forfeitures with disfavor, and the rule is well settled that a party who seeks to avail himself of the right to declare a forfeiture must act with promptness. In *Fargusson* v. *Talcott*, 7 N. D. 183, 189, 73 N. W. Rep. 207, 209, this court said: "When a party stipulates that he will give written notice of his election to take advantage of a breach, where time is of the essence of the agreement, an unwarrantable delay in giving this notice is equivalent to an assurance that as to that default the provision with respect to time has been waived." In the case at bar there is, as has been seen, not only great delay in declaring the forfeiture, but a letter had been written to plaintiff, which practically informed him that no grounds of forfeiture existed except as to the particular matters mentioned in the letters. The letter of January 29, 1901, upon its face, proceeds upon the assumption that the plaintiff's contract of purchase was in force on January 29, 1901, but it embodies a threat to the effect that the contract would be canceled unless the taxes of 1900 and the unpaid balance of interest were paid before February 10th. But this letter, like that of December 26,

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1900, contains no reference to any default in farming the land, or in turning over one-half of the crop of 1900, nor does the letter complain of the fact that plaintiff had not, in person, carried on the farm during that year.

The ninth ground of forfeiture, as claimed in the notice of March 16th, is, "Failure to pay taxes on said premises assessed for the year 1900." The trial court, in its decision of the case, commenting upon this feature of the notice, used language which very well expresses the views of this court. The trial court said: "The ninth cause for forfeiture was for 'failure to pay taxes on said premises assessed for the year 1900.' My recollection is that the evidence shows that Mr. Phelps paid the taxes on January 31, 1901, the amount paid being $76.73. These taxes were thus paid by Mr. Phelps for Mr. Bassett prior to the time of the notice of forfeiture, the notice being dated March 16, 1901. There is some pretty strong language in this contract (Exhibit B) with reference to the rights of Mr. Bassett to forfeit the contract, and the question arises whether Buchholz's failure to pay these taxes would warrant a forfeiture. It appears by a letter dated January 29, 1901, and addressed to Otto Buchholz (Exhibit 8), that Mr. Phelps used the following words: 'You have failed to live up to your contract. Mr. Bassett can and will cancel it unless you pay the balance of interest and the 1900 taxes before February 10th.' The question naturally arises whether there was not a permission for Mr. Buchholz to wait until that time in which to pay the taxes. Another very serious question arises, and that is this: Whether, under the contract, Mr. Buchholz did not have up to February 1st in which to pay the taxes. Taxes are not delinquent until February 1st, and it would appear that, equitably speaking, the one obligated to pay the taxes should have up until the first day when, under the law, taxes become delinquent, in which to pay them. * * * * There is another reason which it appears to me negatives the idea that this is a proper cause for a forfeiture. A reference to the contract shows the following: That Buchholz agreed to pay the taxes after the year 1899, and in case of failure he authorized the first party to pay the same, 'and agrees that all sums so paid shall attach thereto and become a part of the principal sum payable under the terms of this contract; that all sums so paid shall draw interest at the rate of 7 per cent. per annum from the date of payment and shall be deducted from the payment as hereinbefore agreed.' So that under this contract the moment that Bassett paid the taxes they became a part of the principal, just as much as though they had been reckoned in the principal at the time of the making of the contract. If, under the facts of this case, Bassett could not forfeit for the failure to pay any part of the principal, then he would have no rights of forfeiture for nonpayment of taxes, because the taxes paid became a part of the principal. If the act of A. E. Leadbetter in turning over the amount of crop required during the year 1900 was, in contemplation of law, the act of Buchholz, then Bassett, having received his share of the grain due under the contract that year, would be

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regarded in law as having waived his right to a forfeiture of the contract." Upon the matter of the alleged forfeiture the trial court concludes as follows: "It therefore follows that the contract was not canceled, and is in full force at this time." For reasons already appearing, we shall, without further elaboration upon the facts, accept the views of the trial court, so far as we have quoted the same, as the views of this court upon the question of the alleged cancellation and forfeiture of the plaintiff's contract of purchase.

There is no claim made under the evidence or by counsel that any attempt was ever made to cancel the plaintiff's contract by reason of any act or omission of the plaintiff arising under the contract in the year 1901. Nor do we see how any such claim could be consistently urged, in view of the fact that Anna M. Leadbetter was put into the actual possession of the land by Bassett in the spring of 1901, and has remained in possession up to the time of the trial of the action. From what has been said, it must follow that the plaintiff was, at the time this action started, and still is, the owner of an equitable estate in the land under his contract of purchase, and as such owner is entitled to the possession of the land as against the defendants, neither of whom, under the evidence, have any interest or estate in the land. If it is true, as between the plaintiff and Joseph M. Bassett, that plaintiff's contract of purchase remains in full force, it cannot, at the same time, be true that the defendant Anna M. Leadbetter is the owner of any equity or right in the land, unless she entered into the contract of purchase (that of March 22, 1901), in ignorance of the existence of plaintiff's rights under his earlier contract. No claim is made that she entered into her contract with Bassett in ignorance of the fact that plaintiff had previously purchased the land of Bassett. She, as appears from the whole case, had actual notice and full knowledge of such previous purchase. Nor is the contention made by the appellants' counsel that she was misled by anything said or done by the plaintiff, or that, in consequence thereof, she had been lead to buy the land in ignorance of plaintiff's prior rights therein. The utmost which can be urged by defendant Anna M. Leadbetter by way of excuse or explanation of her purchase of the land is that she was informed by Mr. Phelps, at a time when plaintiff was not present, that at the time she signed her purchase contract he (Phelps) had canceled plaintiff's contract of purchase. On cross-examination Anna M. Leadbetter, who was a witness in her own behalf, testified: "Q. You never came down to the office to see Mr. Phelps about buying the land, did you? A. No, sir. Q. And it was Mr. Leadbetter's suggestion that you buy it, was it not, to you, the first you thought of it? A. Yes. Q. And the contract, Exhibit 11, was siged at your house, wasn't it; that is, on this section 13? A. Yes. Q. The land in question in this action? A. Yes. Q. You talked over with Mr. Phelps, at that time, the condition of the title, some, did you not? A. We talked about it. I do not remember just exactly what we said. Q. You

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knew, however, at that time, that Mr. Bassett had previously sold it to Mr. Buchholz? A. Yes. Q. And you knew that there had been no lawsuit to cancel that contract, or anything of that kind? A. I believe it stated right in the contract. Q. Stated what? You knew, or Mr. Phelps told you, at the time that he was selling this land, undoubtedly, that he had given Mr. Buchholz notice of a letter of cancellation, canceling his contract? A. Yes. Q. He stated that by reason of that written notice which he had served on him that he was free to sell the land to you? A. Yes, sir. Q. And you knew that that was the method he had adopted of canceling Mr. Buchholz's interest in the land? A. Yes, as near as I can recollect. Q. You have left the carrying out of the contract largely to your husband, have you not? A. Yes." This testimony shows beyond all question that in entering into the contract of March 22d Anna M. Leadbetter relied wholly upon the assurances of Mr. Phelps that he (Phelps) had, by a letter of cancellation addressed to the plaintiff, annulled all rights which plaintiff had acquired under his contract of purchase. It does not appear that either of the defendants saw the letter of cancellation, or a copy of it, or that either at any time asked to see it, or inquired as to the grounds upon which it was claimed that the plaintiff's rights were forfeited. We have seen that the letter of cancellation, in its legal effect, wholly failed to cancel or cut off the rights of the plaintiff in the land. The abortive nature of the notice of cancellation could, with due diligence, have been discovered, and hence the defendant Anna M. Leadbetter is chargeable with notice that the letter of cancellation was without effect, and did not operate to forfeit or terminate any of the plaintiff's rights under his previous contract of purchase.

The judgmet of the district court must be affirmed. All the judges concurring.

(92 N. W. Rep. 830.)

TORRESON *vs.* WALLA.

Action for Rent—Counterclaim.

In an action by a lessor to recover rent the lessee cannot, under sections 4080, 4081, Rev. Codes, counterclaim damages caused by failure to connect the cellar of a dwelling house with a sewer, there being no showing of an express contract so to do.

Defective Sewerage.

The absence of a sewer to connect with the cellar of a dwelling house, in consequence of which water ran into the cellar, not shown in the case to render the house not fit for occupation by human beings.

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Repairs—Improvements.

The putting in of such sewer connection does not come within the meaning of the word "repairs," "delapidation," or "deterioration," but pertains more to an addition or an improvement of an original character.

Appeal from district court, Cass county; *Pollock*, J.

Action by Ole Torreson against Mrs. O. N. Walla. Judgment for plaintiff, and defendant appeals. Affirmed.

M. A. Hildreth, for appellant.

Morrill & Engerud, for respondent.

MORGAN, J. This is an action for the recovery of rent, brought in justice's court. The complaint is in the usual form in such actions. The answer contains four counterclaims, wherein it is claimed that the defendant was damaged by reason of the omissions of the plaintiff to secure to her the rights belonging to her by virtue of the verbal lease of the dwelling house, pursuant to which she occupied such dwelling house as the tenant of the plaintiff. Three of the counterclaims need not to be mentioned here, as the matters involved therein were submitted to the jury at the trial in the district court, and a verdict therein rendered by such jury, concerning which, so far as the three counter-claims are concerned, no errors are assigned or claimed. The other counterclaim, and the one on which assignments of error are predicated, is pleaded as follows: "And for further answer, defense, and counterclaim herein the defendant avers that under and pursuant to a verbal lease she rented from the plaintiff the house and premises situated at Fourth avenue north, in the city of Fargo, as a dwelling house and boarding house, defendant being engaged in keeping boarders, as plaintiff well knew, at a monthly rental of $20.00 a month; that it was mutually covenanted and agreed at the time of rental of said premises that the plaintiff would keep the same in good repair, and fit for the purpose for which defendant rented the same; that plaintiff, in disregard of said agreement, failed and neglected to repair said premises, and to provide suitable drains and sewer connection for carrying off the water that accumulated on said premises, flooding the cellar of the said premises, and rendering it useless, to defendant's damage in the sum of and to the amount of $50.00." The plaintiff denied the allegations of the counterclaims by replying thereto. Testimony was taken bearing on the issues raised, and at the conclusion of defendant's evidence the plaintiff moved that the court withdraw from the consideration of the jury the question of damages claimed by defendant by reason of water running in and accumulating in the cellar. This motion was granted by the court, and the jury instructed not to consider such question, or the evidence in relation thereto. This ruling was duly excepted to, and the instructions of the court in the charge that such evidence be wholly disregarded were also excepted to, and error is assigned in

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this court on these two questions only, which involve but one and the same question of law. The jury found a verdict in favor of the plaintiff for the sum of $17. The defendant moved for a new trial, based on a notice of intention. A statement of the case was settled, and the motion for a new trial overruled. Judgment was entered on the verdict, and defendant appeals therefrom.

The sole question, therefore, for determination by us is whether the trial court committed error in taking from the jury the issue raised by the counterclaim last referred to. In our judgment, no error was thereby committed. The statutes of this state must authorize the pleading and proof of such a counterclaim in cases of damages claimed against a landlord for failure to repair, or keep in repair, the leased building or premises, before error is shown, as under the common law the landlord was not under any obligation to repair or keep in repair rented premises in the absence of an express contract so to do. *Mumford* v. *Brown,* 16 Am. Dec. 440; *Van Every* v. *Ogg,* 59 Cal. 563; McAdam, Landl. & Ten. § 383, and cases there cited. The provisions of the code define the duties and rights of landlords and tenants in this state in the following language (section 4080): "The lessor of a building intended for the occupation of human beings must in the absence of an agreement to the contrary put it into a condition fit for such occupation and repair all subsequent dilapidations thereof, except that the lessee must repair all deteriorations or injuries thereto occasioned by his ordinary negligence." Section 4081: "If within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself and deduct the expense of such repairs from the rent, or otherwise recover it from the lessor; or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent or performance of other conditions." The rights of the parties in this case must be determined by a construction of these two sections, in connection with the evidence given at the trial. There was no written lease. There is no evidence in the case that the landlord expressly agreed at the time of the leasing to repair the cellar, keep it in repair, or that he would cause a sewer to be connected with it. The statute makes it the duty of the lessor of buildings intended for occupation by human beings to put such buildings in fit condition for such occupation, unless there be a contrary agreement. It is also made the lessor's duty to repair all subsequent dilapidations after notice, if such dilapidations are such that he ought to repair. In this case the building was leased by the defendant knowing that there was no sewer connected with this house. She occupied the house for over three years while in the same condition, and paid the rent for the same up to about two months of the time when she vacated the house. There is no evidence of an agreement to put in a sewer. There is no evidence that the house was not fit for occupation by human beings. Defendant does not claim that it was not fit for such occupation, but claims that the rent paid by her was too high

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with the cellar subject to having water in it. The evidence falls short of showing that the building was unfit for human occupation at the time it was rented, and falls short of showing any subsequent dilapidation or want of repairs that rendered it unfit for such occupation. There was no change in the building during the tenancy from its condition at the time of the leasing. It is not shown in any way that the water accumulated in the cellar by reason of failure to construct the cellar properly or by reason of failure to repair any dilapidations therein. The contention is, in effect, that the lessor was bound to furnish sewer connection. This claim we do not find tenable. To furnish sewer connection would be, in our judgment, furnishing a new improvement, or addition of an original character, and not repairing the building or cellar. It would be furnishing that which is not included in the meaning of the word "dilapidation," "deterioration," or "repairs." The counterclaim pleaded that the defendant expressly agreed to keep the building in good repair; that he failed to do so, and neglected to provide suitable drains and sewer connection for carrying off the water accumulating in the cellar. There is no evidence of an agreement to put in the sewer. Hence the facts pleaded as a counterclaim are not sustained by the evidence. The motion for a directed verdict, so far as this counterclaim was concerned, was properly granted, as there was no evidence in the record to sustain it. The defendant having failed to establish the counterclaim by any evidence, the question raised by counsel that by replying thereto the plaintiff waived it becomes immaterial.

The judgment appealed from is affirmed. All concur.

(92 N. W. Rep. 834.)

CITY OF FARGO *vs.* GORDON J. KEENEY, *et al.*

Eminent Domain—Judgment—Vacating.

This is an action brought to condem land owned by the defendants for the improvement of a public street in the city of Fargo by adding 40 feet to the width of the street. Judgment was entered condemning the land for such use, and awarding the defendants $5,000 as damages. Subsequently, and upon the application of the plaintiff, the district court vacated the judgment, and awarded a new trial. From this order defendants appeal to this court. For reasons stated at length in the opinion, the order appealed from is sustained upon the ground that the judgment was entered by the inadvertence and mistake of the plaintiff's counsel.

Appeal from district court, Cass county; *Pollock*, J.

Action by the city of Fargo against Gordon J. Keeney and others to condemn land. Judgment set aside, and defendants appeal. Affirmed in part.

Morrill & Engerud, for appellants.

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M. A. Hildreth, for respondent.

WALLIN, C. J. The facts in the record which we deem important to a decision of this case, briefly stated, are as follows: The defendants Patrick Devitt and Lottie E. Keeney are, and when this action commenced were, the owners, as tenants in common, of a certain strip of land 40 feet in width within the city of Fargo; said land consisting of 14 lots, numbered from 1 to 14, inclusive, and embraced within Keeney & Devitt's Third addition to the city of Fargo. It appears that said strip of land is parallel to and adjoins a certain street of said city, viz., Seventh avenue north; and it further appears that, in the opinion of the city council, it was necessary to so enlarge and widen said Seventh avenue north as to embrace said strip of land, and the whole thereof. The record shows that on December 10, 1901, the city council of the city of Fargo, being then in session, adopted a certain resolution looking to the acquisition of the title to the strip of land in question. Said resolution, so far as the same is now material, is as follows: "Be it resolved by the common council of the city of Fargo, that it is necessary to the well-being of said city and the citizens thereof, and particularly to those people who live along and adjacent to 7th Ave. north, that the said 7th avenue be opened its full width as a street." Here follows a description of the land in question. After describing the land, the resolution proceeded as follows: "Furthermore, that the city attorney be empowered and is hereby instructed to commence condemnation proceedings for the purpose of acquiring possession of the tracts as above described, for the use of the city as a street." Soon after the adoption of the resolution by the city council, this action was instituted; H. F. Miller, as attorney, appearing for the city, and Morrill & Engerud appeared for the defendant Lottie E. Keeney; and S. G. Roberts, then an alderman of the city, appeared as attorney for the defendant Patrick Devitt. It will not be necessary to set out the pleadings in the action further than to state that the complaint set out the substance of said resolution of December 10, 1901, and other facts tending to show that the strip of land in question was needed for a public purpose, viz., for widening said Seventh avenue north. The relief demanded was, in substance, that the land in question should be condemned for the use of said city as a street, and that the court should determine the value of the use of such land for street purposes. The defendants Patrick Devitt and Lottie E. Keeney answered separately, but the answers raised no substantial issues, but, on the contrary, practically conceded that said land was needed for public use as stated in the complaint. But it was alleged in said answers, respectively, that the total value of said land was the sum of $6,000. After issue was so joined in the action, counsel entered into a stipulation whereby a jury trial was waived, and counsel consented that the trial court should appoint three referees to try all the issues embraced in the action, and upon such stipulation the trial court, by its order, appointed three referees to try all the

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issues. The record further shows that said referees, after taking the statutory oath, proceeded to take the evidence offered by the respective parties. There was some formal evidence offered relating to the title of the land in question, about which there is now no dispute, and two witnesses were sworn as to the value of the land, and both testified, in effect, that its aggregate value was $5,000. The record shows the further fact that a certified copy of a certain other resolution of the city council, adopted March 3, 1902, was put in evidence by the city attorney without objection, which resolution is as follows: "Be it resolved by the mayor and common council of the city of Fargo, that it is necessary and essential to the well-being and growth of said city, and particularly to the persons residing along Seventh avenue north and adjacent thereto, that said Seventh avenue, which is now only forty feet in width, be opened and widened forty feet more by the purchase and addition thereto of forty feet of land extending from Broadway to Second street, along said Seventh avenue north, making the width of said street, when so opened, eighty feet and uniform with other streets." Upon the hearing of the order to show cause evidence was received showing the publication of the last-mentioned resolution in the official newspaper of the city. The record of the proceedings had at said council meeting held March 3, 1902, embraces the following entry: "The city attorney reported verbally that progress was being made in the matter of condemning and securing Keeney & Devitt's Third addition for street purposes." Also the following: "Upon motion by Alderman Roberts, the city attorney was instructed to proceed with the condemnation proceedings upon the lines indicated in his report." The undisputed evidence also showed that there was not, at the time of the trial, a dollar available in the city treasury with which to pay any judgment against the city. After taking the evidence the referees submitted their report to the court, embracing findings of fact and conclusions of law. The findings of the referees need not be set out further than to state that the referees found as facts that the city council adopted said resolution of December 10, 1901; that the plaintiff by this action, is seeking to acquire the strip of land in question for public use as a street; that the land sought is necessary and ought to be acquired for such use; and that the defendants Lottie E. Keeney and Patrick Devitt are the sole owners of the land, and that the land is of the aggregate value of $5,000. As conclusions of law the referees found as follows: "Conclusions of Law: (1) That the said plaintiff city of Fargo has the right and power conferred upon it by law to lay out, open, grade, and otherwise improve the streets within its corporate limits; and that when it becomes necessary, in order to make any of said improvements herein specified, to take or damage private property, said plaintiff corporation may exercise the right of eminent domain for any public use authorized by law, in the manner provided in chapter 35 of the Code of Civil Procedure of the Revised Codes of North Dakota,

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and has the power to exercise the right of eminent domain in the taking of the property in the complaint and in the findings of fact herein mentioned and described, and have the same condemned for the proposed public use as a street. (2) That the damage for the taking of the said lots and parcels of land hereinbefore described, as aforesaid, is five thousand dollars ($5,000.00)." The report of the referees was confirmed, and judgment was entered in the trial court to the effect that the said owners of the land should, respectively, have judgment against the city for the sum of $2,500 and costs, and that the land in question should be condemned for said street purposes, and that the title thereof be, and the same was, by the terms of the judgment, vested in the city of Fargo. This judgment was entered March 7, 1902. Later, upon an affidavit made by M. A. Hildreth, and other proofs, the trial court issued an order to show cause why the judgment so entered should not be vacated and set aside, or for such other and further relief as the court might deem proper to grant. No counter affidavits were submitted. The hearing of the order to show cause resulted in an order of the district court vacating said judgment and granting a new trial, and from such order the defendants have appealed to this court.

The affidavit of M. A. Hildreth, upon which the order to show cause was issued, is as follows: "M. A. Hildreth, being duly sworn, says he is city attorney and attorney for the plaintiff in this proceeding. That upon taking the office on the 15th of April, 1902, he was ordered by the common council of the city of Fargo to investigate the judgment against the city of Fargo in this action, and report at the next meeting of the common council. That he did make such report to the common council on the 5th day of May, 1902. That he advised the common council that such judgment was invalid, and should be vacated and set aside. Affiant makes a part of this affidavit a certified copy of the proceedings of the common council relating to the instituting of this suit. That under section 2279 of the Civil Code of this state it was necessary that the common council pass a resolution to open up the street in question and to have the same condemned for street purposes. That, from the records of the common council, said resolution was passed on the 3d day of March, 1902. That it was voted for and by, among other common councilmen, by the Hon. S. G. Roberts. That this resolution was published on March 8, 15, 22, and 29, 1902, and that said suit was at that time pending in this district court of this county and state, the same having been brought on the 20th day of January, 1902. That before the completion of the time specified in said notice under the said section a judgment was entered in this action. That affiant refers to the judgment roll and all the papers attached thereto, and makes the same a part of this motion, and will refer to the same upon the argument thereof. Affiant further says: That the said Hon. S. G. Roberts was an alderman during all the said times, and a member of the common council, and that at the time he voted for said resolution, March 3, 1902, he had already appeared in said law-

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suit, and filed a written answer for Patrick Devitt, a person interested in the outcome of said suit. That he verified said answer on the 25th day of February, 1902, as attorney for said Patrick Devitt. That he participated in all the proceedings, and signed a stipulation dated on the very day said resolution was introduced into the common council, to wit, March 3, 1902, as appears from the judgment roll; and that on the 4th day of March, 1902, he was present at the taking of testimony in said cause. That since said judgment he has been active in attempting to have the same paid while a member of the common council. That at a special meeting of the common council on the 21st day of April, 1902, said Hon. S. G. Roberts undertook to introduce a resolution authorizing the mayor and common council to make a loan for the payment of said judgment, but, however, said resolution was not passed. That upon the adoption of affiant's report on the 5th day of May said Roberts was present as a member of the common council, and immediately after the reading of said report and opinion by affiant admitted that he had appeared in said action, and claimed that he had a legal right so to do; but when the question of the adoption of said report of said city attorney came up said Roberts asked to be excused from voting. That afterwards his name did not appear upon an application for a peremptory writ of mandamus in these proceedings. Affiant says: That it clearly appears that no appropriation was ever made to meet this judgment. That, from the affidavit of the city treasurer, there are no funds to pay the same, and that the city is overwhelmed in debt; and further, that the common council have passed a resolution ordering the city attorney to have such judgment vacated and set aside. That it appears on its face that it exceeds the sum of three thousand dollars ($3,000.00), and cannot, therefore, be paid, by virtue of section 2492 of the city charter. That the city council, in affiant's opinion, have no power to make an appropriation to pay said judgment before September, 1902. Affiant further says that he believes the irregularities pointed out with referece to said resolution render said judgment void, and that the city of Fargo would be unable to make any special assessment for the conducting of the street in question, and furthermore, that the appearance of the said S. G. Roberts in said matter, and his participation in the meeting and voting for said resolution, invalidates the same; that affiant makes a part of his affidavit, so far as the facts therein contained are concerned, the affidavit of C. H. Mitchell, city treasurer, and the affidavit of H. J. Gibson, city auditor." The affidavits and exhibits referred to in the affidavit of M. A. Hildreth, so far as the same are deemed important, have already been set out, except that the city records show that there was an appropriation made in September, 1901, of $6,500, for "streets and bridges," and that on May 1, 1902, there was an unexpended balance in said fund of $2,592.76. The order appealed from is as follows: "The above-entitled matter coming on before the court for hearing upon an order to show cause why the judgment heretofore rendered in said action should not be vacated and set aside, M.

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A. Hildreth, Esq., city attorney, appearing for the plaintiff in support of said motion, and Messrs. Morrill & Engerud for the defendants, in opposition thereto, the motion was heard upon the following papers, to wit, original order to show cause, dated May 9, 1902; affidavit of M. A. Hildreth; certified copies of the records of the city council of the city of Fargo, under the certificate and seal of H. J. Gibson, city auditor; affidavit of C. H. Mitchell, city treasurer, together with Exhibit A, thereto attached, marked 'Condition of Appropriation,' and Exhibit B, as to form of certificate of indebtedness; the judgment roll in said action; and the affidavit of publication of the resolution of the city council of March 3, 1902, said affidavit being verified April 14, 1902. And now, after hearing the arguments of counsel and due consideration thereof, the court finds that in this matter it is conceded that the resolution of March 3, 1902, voted for by Mr. Roberts, and by which it was sought to bind the adjacent property owners with the cost of the street, was not passed and published in time to affect or be relevant to the matters involved in this suit; that counsel for defendants rely wholly upon the resolution of December 10, 1901, passed during the absence of Mr. Roberts from the council, which, if sustained, throws the entire cost of $5,000 onto the city at large. I am of the opinion, however, from this record, that the old city council supposed it was proceeding under the resolution of March 3, 1902. Upon the entire record, grave doubt arises whether there is sufficient strength to the resolution of December 10, 1901, to bind the city to the payment of the judgment. I am of the opinion that there has been such mistake and inadvertence in this action that in justice to all parties concerned the judgment should be vacated, and set aside, and a new trial granted. Motion costs to be taxed in favor of plaintiff at $10."

In this court counsel upon both sides have devoted a good deal of time to the discussion of the question whether the judgment was or was not fraudulently obtained, and whether the trial court had or had not jurisdiction to enter the judgment. It appears, however, that the trial court did not place its order upon either of these grounds, and, inasmuch as the decision of the case in this court will turn upon another feature of the case, we shall pass over all questions of fraud or want of jurisdiction in the court below. But the record shows that the district court, in vacating the judgment, did so upon the ground that the judgment was entered by mistake and inadvertence. The language of the court is: "I am of the opinion that there has been such mistake and inadvertence in this action that, in justice to all parties concerned, the judgment should be vacated and set aside, and a new trial granted." From this language it conclusively appears that in setting aside its judgment the court did not proceed upon the theory that the court erred in deciding any question of law or fact relating to the merits of the case; but did proceed upon the theory that the judgment had been entered as a result of mistake and inadvertence. This class of actions is governed by the rules of procedure which obtain in civil actions (Rev. Codes 1899, §

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5972), and therefore the court below, in deciding the motion to vacate the judgment, had and could lawfully exercise the discretion conferred upon district courts by section 5298 of the Revised Codes. That section provides that said court may, "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." This language clearly confers the requisite authority upon the district court, in furtherance of justice, to relieve a party from a judgment in any case where the same was taken against him through "his mistake, inadvertence, surprise of excusable neglect." Therefore the question left for determination is one of fact, viz., whether the trial court erred in ruling that the judgment in this case was so taken. In deciding this question it should be premised that, where an application to vacate a judgment or order is not based upon irregularities of procedure, but is placed exclusively upon the ground of mistake, surprise, inadvertence, or excusable neglect of the moving party, such application, under the authorities, is an appeal to the favor, and is not in the nature of an application based upon a strict legal right. In such cases the application invokes the sound judicial discretion of the court to which it is addressed, and in all such cases it is well settled that there can be no reversal of the ruling of the court below by a reviewing court, except where the court of review finds that the trial court abused the discretion vested in it by the law. The mere fact that the appellate court does not entirely agree with the court of original jurisdiction in its rulings does not suffice to show a cause of abuse of discretion within the meaning of the authorities. This court had occasion to state and apply this well-established rule of practice in the case of *Manufacturing Co.* v. *Holz*, 10 N. D. 16, 84 N. W. Rep. 581. That was a case where judgment was entered by default against a defendant who subsequently made application to vacate the judgment, and in doing so the defendant submitted affidavits to show that his default was excusable under the facts shown. In that case this court said: "We acquiesce in this proposition of counsel to the extent of holding that the appellants' case does not rest upon any strict legal right, but, on the contrary, does rest upon an appeal to the favor, and is therefore addressed to the judicial discretion of the court below." The statute authorizing the trial court to grant relief as against judgments and orders entered by inadvertence, mistake, or excusable neglect is highly remedial, and has received at the hands of the courts a very liberal construction. See *Buell* v. *Emerich*, 85 Cal. 116, 24 Pac. Rep. 644. As to the distinction between cases which appeal to the favor of the trial court and those where the application is based upon a strict legal right. See *Nichells* v. *Nichells*, 5 N. D. 125, 64 N. W. Rep. 73, 33 L. R. A. 515, 57 Am. St. Rep. 540. See, also, *Garr, Scott & Co.* v. *Spaulding*, 2 N. D. 414, 51 N. W. Rep. 867.

The final question presented is, therefore, whether the vacating

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order is one involving an abuse of discretion on the part of the trial court. Unless it is such, this court, under an established rule of practice in this and other courts, cannot disturb the ruling of the court below upon which court the statute, by its terms, devolves a discretion in this class of cases. It is our opinion that the order does not embody an abuse of discretion, and we are led to this conclusion by considerations which inhere in the very nature of the subject-matter involved in the litigation. It appears that the city council deemed it to be necessary to acquire the land in question for a public use, viz., for an improvement to Seventh avenue north. But the acquisiition of the land involved either its purchase by a contract of purchase and sale or a condemnation of the land under the power of eminent domain. The testimony shows that on December 2, 1901, the city attorney advised the city council to the effect that the title could only be acquired by a condemnation proceeding. The grounds of his advice are not stated, but, if it was intended thereby to advise the city council, in substance, that certain obstacles of a legal and financial nature then existed which would prevent the city from buying the land and paying for the same at that time, then we have no hesitancy in saying, upon the existing facts as shown by the testimony, that such advice was sound, and that none other would have been proper under the circumstances. The contemplated improvement of Seventh avenue north was to be costly, and to include a large outlay of money. The first item of such expense would be the amount necessary to be paid for the land itself, which land, it appears, is worth $5,000. If this expense was to be paid out of the city treasury, and from funds derived from the general revenues of the city, the statute required that an appropriation for such improvement should have been embraced as an item in the annual appropriation bill, which bill the statute requires to be enacted by the council in the form of an ordinance. See Rev. Codes 1899, §§ 2262, 2263. Section 2262 declares that such appropriation bill "shall specify the purposes for which such appropriations are made and the amount appropriated for each purpose"; and section 2263, referring to improvements particularly, declares: "and no expenditure for an improvement to be paid for out of the general fund of the corporation shall exceed in any one year the amount provided for such improvement in the annual appropriation bill." The exceptions mentioned in this section have no application to this case. No claim is made that the annual appropriation bill for the fiscal year in question embraced an item which in terms covered the purchase money of the land in question, nor was the contemplated improvement mentioned in terms or at all in the annual appropriation bill. It does appear that said bill embraced an appropriation of $6,500 for "streets and bridges," and the appellant's counsel contend that this item, or so much thereof as was unexpended, was available, and could have been been used in paying for the land in question. But in this construction of the statute we cannot concur. We think the words "streets and bridges," found in the appropriation bill, have reference

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only to the usual and ordinary items of expense which are incident to a proper maintenance and preservation of the streets and bridges within the city. It is clear that the phrase "streets and bridges" does not import or suggest any costly improvement of an unusual and extraordinary character, such as that in question, and which involved buying and paying for an entire addition to the city of Fargo, embracing 14 city lots, worth $5,000. The purpose of the statute is to inform the taxpayers in advance, and before the appropriation bill is finally passed, fully and specifically what items of expense are contemplated, and for which a tax is to be levied. Among the items which may be embraced in the annual bill the statute singles out "improvements." This was clearly done to make appropriations, at least for large and costly improvements, separate items, to stand upon their independent merits. See, upon this point, *Engstad* v. *Dinnie*, 8 N. D. 1, 76 N. W. Rep. 292. In that case the court said: "The statute differentiates improvements from ordinary expenses, and places them in a class by themselves." It appears, therefore, that on December 10, 1901, and on March 3, 1902, there was no fund in the city treasury out of which the land could have been lawfully paid for.

But it is also our opinion, upon this record, that the city council did not at any time in question contemplate paying for this land out of the general revenues of the city. The very terms of both of the resolutions adopted by the council point to a contrary conclusion. The resolutions are above set out, and the important language in each is as follows: That of December 10, 1901, declares: "That it is necessary to the well-being of said city and the citizens thereof, and particularly to those people who live along and adjacent to Seventh avenue north, that the said Seventh avenue be opened its full width as a street." The language of the resolution of March 3, 1902, is: "Be it resolved by the mayor and common council of the city of Fargo that it is necessary and essential to the well-being and growth of said city, and particularly to the persons residing along Seventh avenue north and adjacent thereto, that said Seventh avenue, which is now only forty feet in width, be opened and widened forty feet more." These resolutions were both before the referees in this action. That first adopted was set out in the complaint, and admitted in the answers, and that of March 3d was offered by the city attorney, and received in evidence without objection. We discover no essential differences in the terms of these resolutions; but it appears that the former was never published, and that the latter was published for four weeks in the official newspaper of the city, but such publication did not begin until the next day after the entry of judgment in this action. As has been suggested, the terms of these resolutions lead to the conclusions that the city council at no time contemplated paying for the land in question out of the general fund of the city. On the contrary, it is quite evident from their language that the resolutions were framed with express reference to the re-

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quirements of section 2279 of the Revised Codes, which section governs in all cases where the expense of a contemplated street improvement is to be met by a special assessment to be made upon adjoining property. In a case where a special assessment is to be levied, this section provides that: "The city council shall, by resolution, declare such work or improvement necessary to be done, and such resolution shall be published for four consecutive weeks at least once a week in the official newspaper of the city." We find no other provision of the statute, and none has been cited, which requires the city council to pass any similar resolution in a case where the expense of a contemplated street improvement is to be paid out of the general fund in the city treasury. Any such resolution, therefore, would be superfluous, and of no binding force, where the expense of a proposed improvement is to be met out of our funds raised by general taxation. Nevertheless, the city attorney did not delay the institution of this action until the resolution of December 10th could be published, nor until taxpayers owning adjoining property to be specially assessed were offered an opportunity to file with the city auditor a written protest against the improvement proposed, as such taxpayers would have had a right to do, under the provisions of section 2279, if the resolution had been published as required by that section. It is further true that the complaint in this action does not contemplate any assessment as against the owners of the adjoining land, who are the parties which the resolution declares are particularly concerned in the proposed improvement; nor did the court, by its judgment, assess the damages or apportion the cost of the improvement as between those particularly interested in the street improvement in manner and form as provided by section 2454, Rev. Codes 1899.

Finally, the fact stands out clearly that this action was prematurely brought, in this: that it was instituted by the city attorney before the taxpayers especially interested in the improvement had an opportunity to file a protest against the improvement so proposed and declared to be necessary by the council. It is equally plain that the trial court omitted, in entering its judgment, to assess the damages as between the taxpayers particularly interested, viz., those who, under the theory of the resolutions of the council, would be required to pay the damages arising from the condemnation of the land for street purposes. That the action was prematurely commenced, and the judgment entered by inadvertence and mistake, is, therefore, obvious. The council did not authorize the institution of any action in which it would be legally possible to enter a judgment in a lump sum to be paid out of the city's funds. On the contrary, the tenor and purport of its resolutions point only to a judgment requiring a special assessment as against parties particularly interested in the improvement to be made. It was, therefore, either a mistake or inadvertence or both to ask for and to obtain the judgment actually entered. Nor could this judgment, in our opinion, ever be collected by any legal

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process whatever. It is not the policy or the province of courts to compel the payment of judgments which are entered by mistake and inadvertence, and which, if paid, would involve the disbursement of public funds in direct violation of positive provisions of the statute. The order setting aside the judgment was, therefore, a proper order and manifestly was not an abuse of discretion.

But the motion costs,—$10,—imposed upon the defendants as terms, is clearly an error. The city was at fault, and by its motion to vacate the judgment upon the grounds of its mistake or inadvertence the city appealed to the favor of the trial court. It might have been just to impose terms as against the city as a condition of granting the favor asked of the trial court. The judgment having been regularly entered in due course, and in accordance with the practice of the district court in such cases, and entered by a court having jurisdiction, the application to vacate the same was clearly an appeal to the favor.

The order appealed from is sustained, except as to the item of motion costs. All the judges concurring.

(92 N. W. Rep. 836.)

ERICKSON *et al. vs.* CASS COUNTY *et al.*

Drainage Act—Due Process of Law.

Chapter 51, Laws 1895, as amended by chapter 79, Laws 1899, now embodied in chapter 21 of the Political Code, Rev. Codes. 1899, and embracing sections 1444 to 1474, inclusive, known as the "Drainage Law," provides a hearing for landowners upon notice before assessments for benefits become final, and it is not, therefore, vulnerable to the objection that it deprives such owners of their property without due process of law.

Title of Act.

The amendatory act, chapter 79, Laws 1899, entitled "An act to amend section * * * 1466 of the Revised Codes, relating to the establishment, construction and maintenance of drains," does not violate section 61 of the state constitution, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title. * * *"

Amendment of Statute.

It is not necessary that the provisions embodied in an amendment to a section of a statute shall relate directly to the particular provisions contained in the section amended. It is sufficient if the subject-matter of the amendment is germane to the subject of the act of which the amended section is a part, and is within the title of the original act.

Issuance of Bonds.

Landowners who are assessed for benefits under this act are not deprived of their property without due process of law by the issu-

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ance of the interest-bearing bonds to defray the cost of constructing drains, and the postponement of their assessments and divisions thereof into as many parts as the bonds have years to run, as authorized by section 1474, Rev. Codes.

School Lands held in Trust.

Lands granted by the United States to the state for school purposes are held in trust, and are not subject to taxation or assessment for benefits arising from the construction of drains.

Proceedings of Drainage Board not Invalid.

It is *held*, upon a trial anew in an action to enjoin the collection of drainage assessments, that the board of drain commissioners complied with the requirements of section 1454, Rev. Codes, as to the publication and posting of notices of hearing upon assessments, and that the assessment notice was in proper form, and was legally posted and published; further, that the proceedings of the drainage board in establishing and constructing the drain in question in this case were not invalid by reason of certain alleged defects in the right of way deeds.

Board a Tribunal to Determine Benefits.

The board of drain commissioners is made the tribunal by statute to determine what lands are benefitted by the construction of drains, and to apportion the cost thereof according to benefits, and, in the absence of the allegation and proof that they acted fraudulently, their determination is not open to collateral attack, and is conclusive. Where the jurisdiction of the board to act is established by the filing of a sufficient petition for the construction of a drain, and proper notice of hearing has been given, courts will not inquire into the correctness of their determination upon questions within their jurisdiction, including the assessment of benefits.

Legitimate Charges.

It is *held* that certain items which were included in the cost of the drain involved in this case by the board of drain commissioners, which are objected to by appellants, and are referred to in the opinion, contributed to the construction of the drain, and were legitimate charges, under section 1456, Rev. Codes, which authorizes said board to include in the cost of drains such expenses as contribute to their establishment, construction, and maintenance.

Assessments not "Conjectural" or "Speculative."

It is *held* that the assessments authorized to be imposed upon the lands by section 1452, Rev. Codes, are for benefits which are special to the land assessed, and are not what are commonly termed "conjectural" or "speculative" benefits.

Collection of Assessments will not be Enjoined.

A court of equity will not extend its extraordinary remedy of injunction to prevent the collection of assessments for benefits imposed to pay the cost of constructing drains, when the parties seeking such relief have been actively or impliedly consenting parties to their construction, and to the proceedings which led to the assessments, whether such assessments are legally valid or not; and in such actions parties who have petitioned for and induced the construction of drains cannot be heard to question either the constitutionality of the law under which the drain was constructed,

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or the legality of the proceedings taken thereunder, for the purpose of defeating their assessments.

Estoppel.

It is *held*, on the facts detailed in the opinion, that the plaintiffs are estopped from asserting the invalidity of the assessments imposed upon their lands by the board of drain commissioners of Cass county to defray the cost of constructing Argusville drain No. 13.

Chapter 25, Laws 1901, Unconstitutional.

Chapter 25, Laws 1901, entitled "An act to provide for the allowance and taxation of costs for additional attorneys' fees against the defendants in actions to enjoin drainage proceedings or the levy and collection of taxes and assessments therefor," is invalid, under section 61 of the state constitution, for the reason that the real subject of the act, which is the allowance and taxation of additional attorneys' fees against the plaintiffs in such actions, is not expressed in the title.

Appeal from district court, Cass county; *Lauder*, J.

Action by August Erickson and others against Cass county, the board of county commissioners of Cass county, and O. J. Olson, auditor. Judgment for defendants, and plaintiffs appeal. Modified and affirmed.

J. E. Robinson, for appellants.

Ball, Watson & Maclay, for respondents.

YOUNG, J. The plaintiffs, who are 52 in number, united in instituting this action for the purpose of enjoining the county auditor of Cass county from extending upon the tax lists of that county certain assessments against their lands, made by the drain commissioners of that county, to defray the cost of the construction of Argusville drain No. 13, and to enjoin the county commissioners of said county from issuing drainage bonds to cover the expense incurred in its construction. The complaint alleges "that in all things pertaining to the construction of said drain, the assessments of benefits under the same, and the awarding of contracts for such construction, and the issuing of warrants for the expense of the same, and in all other matters thereto pertaining, the said drain commissioners failed to comply with the requirements of the law, and by reason of such failure all their doings as such drain commissioners are entirely void," in this: That "the petition for the drain was not signed by the owners or legal representatives of such lands as, in the aggregate, are liable to assessment for the major portion of the cost thereof"; that the drain was established without any evidence showing the interest of the petitioners in the lands liable to assessment; that the same was constructed at an expense of $42,000; that the total benefits to be derived from said drain do not amount to more than one-third part of the cost thereof, and that the total cost should not have exceeded $12,000; that contracts for the construction of the drain were not let in such a manner as to secure fair and honest competition; that a large portion of the expense allowed for the construction of the

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drain, to wit, half the expense, or more, was allowed upon the cost of a drain formerly constructed under the drainage laws of 1895, which could not be legally assessed against their lands; that the commissioners allowed to themselves and others large and unauthorized sums as expenses for constructing said drain; that they failed to make any legal assessment of benefits; that they charged against the lands of plaintiffs a sum or percentage equal to three times the amount of the benefits to said lands; that they failed to make charges against other lands in the vicinity of the ditch which were benefitted by its construction; that they did not give 10 days' notice of the time and place of their meeting for the purpose of reviewing the assessments, and did not hold any session as a board for the purpose of such review. The complaint further alleges that the county commissioners of Cass county intend to issue negotiable bonds, under section 31 of chapter 51 of the Laws of 1895, to the full amount which the said drainage commissioners have allowed as the expense of constructing said Argusville drain No. 13. The answer denies generally all the allegations of the complaint, avers that all of the proceedings relating to said drain and the assessment of benefits therefor were in accordance with the requirements of the statute, and admits that the plaintiffs own lands which have been assessed, and that the county commissioners of Cass county intend to issue bonds as alleged in the complaint.

The trial court found that the drain in question was established upon a proper and sufficient petition, and "that the board of drain commissioners complied fully with the requirements of law in establishing and constructing said drain, in making assessments of benefits under and for the same, and in all other matters pertaining thereto;" further, "that the lands of the plaintiffs, and each of them, were and are benefited, both directly and indirectly, by the construction of said drain, and that the assessment for benefits laid thereon by the board of drain commissioners were and are in all things in accordance with such benefits, and are legal and valid charges upon such property." The court further found that the plaintiffs, and each of them, at all times had knowledge that the drain was being constructed, during the time that the construction was in progress, and of the fact that assessments had been made and levied thereon, and that they permitted said proceedings to progress, and said drain to be constructed, and the sum of about $42,000 to be paid out, or liability therefor to be incurred, for the construction of said drain, without applying to the district court or any other court for preventive or other relief. The court further found that $750 is a reasonable amount to be taxed as attorneys' fees against the plaintiffs, in addition to the statutory costs and disbursements. From the foregoing facts the court found, as conclusions of law, that the assessments against plaintiffs' lands are legal charges thereon; that plaintiffs, and each of them, are estopped to question the validity or legality of said assessments; that plaintiffs are not entitled to any

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relief, and the defendants are entitled to recover and have taxed against the plaintiffs, as part of the costs and disbursements in this action, the sum of $750 as attorneys' fees, in addition to the statutory costs and disbursements. From the judgment entered in pursuance of such findings the plaintiffs have appealed to this court for a review of the entire case.

The record presented in this court contains a large amount of testimony. There are, however, but few facts in dispute, and, as we shall hereafter see, they are but of minor importance. A proper determination of the case upon this appeal will depend almost entirely upon the solution of a number of legal questions, to which we will first turn our attention. It is urged at the outset that the entire drainage law (chapter 51 of the Laws of 1895, with amendments, now known as "Chapter 21 of the Political Code, Revised Codes of 1899") is void. The reason assigned for this contention is that "under it taxes are levied without due process of law, contrary to amendment 14 of the federal constitution." No reasons are advanced, which, in our opinion, tend to show that assessments authorized by the act in question are vulnerable to the objection urged. If we understand counsel's position, it is that the statute does not accord to persons whose lands are subjected to assessment a sufficient hearing. In this counsel is in error. Before any assessment authorized by this act becomes final, it is subject to review upon notice. Sections 1451 and 1452 provide for such review, and that it shall be upon notice of the time when and place where the review is to be had. It is true, several acts are required to be done by the drain commissioners prior to the assessment and hearing. These include an inspection of the route by the drain commissioners, a survey of the same, the making of the specifications, plats, and profiles, contracts for the right of way, and the order establishing the drain; all of which are done without a hearing. These steps, however, are altogether preliminary, and do not, in themselves, impose any burden upon the landowner. The question as to what lands shall be subjected to assessment and what proportion of the burden each tract shall bear is determined later, and upon notice. It is well settled that, where provision is made "for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the taxes shall be assessed upon his land, there is no taking of his property without due process of law." *McMillen* v. *Anderson*, 95 U. S. 37, 24 L. Ed. 335; *Davidson* v. *City of New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hager* v. *Reclamation Dist No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Spencer* v. *Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Wilson v. City of Salem* (Or.) 34 Pac. 9. The rule announced by Mr. Justice Miller in *Davidson* v. *City of New Orleans*, supra, and approved in *Hager* v. *Reclamation Dist. No. 108*, supra, is: "That whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, and those laws provide for

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a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." In *State* v. *Certain Lands in Redwood Co.* (Minn.) 42 N. W. Rep. 473, Mitchell, J., in answering a contention "that in proceedings in the exercise of the taxing power the property owner is entitled to notice, and to be heard in each preliminary step of the proceedings *pari passu* with their progress," said: "We know of no case where it was ever held that a party was entitled to notice of and to be heard in each step in tax proceedings as it is taken. We doubt whether any tax law ever provided for any such thing. The principle running through all the cases is that a law does not infringe upon the constitutional provision under consideration if the property owner has an opportunity to question the validity or amount of the tax, either before that amount is determined, or in subsequent proceedings for its enforcement." The hearing afforded to landowners by the act in question is adapted to the necessities of proceedings of this nature, and gives an opportunity to persons whose property is assessed for benefits to contest the assessment. The supreme court of the United States in affirming *Voight* v. *City of Detroit* (Mich.) 82 N. W. Rep. 253, 184 U. S. 115, 22 Sup. Ct. 337, 46 L. Ed. 459, said, as to the sufficiency of the hearing given by the Michigan law on assessments for benefits, which was before the city council: "It would be difficult to find any provision fairer than this in purpose, and which so essentially satisfies every requirement of due process of law. And such purpose cannot be defeated if a hearing to the property owner can prevent defeat. He is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him, and it is only with the charge upon him that he is concerned, and of that alone can he complain. In the legality of that charge is necessarily involved the legality of all which precedes it, and of which it is the consequence."

Counsel for appellant also attacks the constitutionality of the amendment to section 1466, Rev. Codes 1899, under which the board of drain commissioners added the sum of $13,000 to the cost of the drain in question. This sum was allowed by the board as compensation for services rendered, work done, and money expended upon a drain formerly constructed or partially constructed upon the route of the present drain; the proceedings under such former drain having been held invalid, and the same having been abandoned. It was determined by the board that the work done and services rendered on the former drain contributed to the present drain to the extent of the sum so allowed. The authority for their action is found in section 1466, Rev. Codes 1895, as amended by chapter 79, Laws 1899, now known as "section 1466, Rev. Rodes 1899." Neither the original section nor any portion of the drainage law, chapter 51, Laws 1895, of which setion 1466 was a part, conferred any such authority upon the drain commissioners. The authority exists, if at all, solely by

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virtue of the provisions added to section 1466 by the amendatory act, chapter 79, Laws 1899. It is not contended that the provisions added by the amendment are not broad enough to authorize the action taken by the board, or that they do not relate to the subject of the original act of which section 1466 is a part, or that the provisions embodied in the amendment are not just, or that they are not proper in a comprehensive drainage law. The supreme court of Michigan, in *Anketall* v. *Hayward*, 78 N. W. Rep. 557, in passing upon the provisions of the drainage law of that state, similar to those embodied in the amendment here in question, said: "It is competent for the legislature to provide for the completion of a partly finished drain, and point out a way for the correction of errors, so as to make it possible to complete it, although the expense is increased thereby. The increased expense must be paid by those who are benefited by the drain as a part of the cost. *Brady* v. *Hayward* (Mich.) 72 N. W. Rep. 233; *Hauser* v. *Burbank* (Mich.) 76 N. W. Rep. 109." See, also, *Curran* v. *Board* (Minn.) 57 N. W. Rep. 1070. The sole ground of appellants' attack upon the amendment is that its provisions are not germane to the section amended, or, as stated in the language of counsel, "the annex to section 1466, Rev. Codes, by chapter 79, Laws 1899 (under which $13,000 was added to the assessment), is not germane to the original section, and hence it contravenes setion 61 of the constitution." The question presented is new in this state, and is not entirely free from difficulty. The title of the original drainage law (chapter 51, Laws 1895) is as follows: "An act to provide for the establishment, construction and maintenance of drains in this state." The act embraces 32 sections, all of which were embodied in the Revised Codes of 1895 in the order in which they appeared in the original act, and were numbered sections 1444 to 1474, inclusive. They are also contained in the Revised Codes of 1899 under the same numbers, as amended by chapter 79, Laws 1899. The title of the amendatory act (chapter 79, Laws 1899) is as follows: "An act to amend sections 1447, 1448, 1450, 1452, 1453, 1454, 1457, and 1466 of the Revised Codes, relating to the establishment, construction and maintenance of drains." Section 1466, prior to its amendment, referred entirely to the duties of courts in actions to enjoin assessments or to annul drainage proceedings. Under the terms of said section they were required to disregard errors and irregularities in the proceedings establishing and constructing drains. Authority was given to them, upon the application of either party to appoint viewers, and upon a final hearing to make orders affirming assessments in whole or in part, or require refundment, in whole or in part, of assessments paid under protest, as justice might require. The section, as amended, retains these provisions without change, but adds thereto certain further provisions, whereby drain commissioners are authorized to establish drains upon the route of drains which have been abandoned or been declared invalid, to determine the extent of the benefit to the new drain of the services rendered, money expended, and work done under the invalid or abandoned

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proceedings, and to issue warrants therefor to the extent of the benefit so determined; all of which is required to be done at a meeting of the board held pursuant to 10 days' notice, at which all persons interested are entitled to be heard. It is patent that the provisions of section 1466, prior to its amendment, were germane to the subject of legislation expressed in the title of the act of which it was a part. It is also equally apparent that the provisions added by the amendment also relate to that subject, to wit, the "establishment, construction and maintenance of drains in this state." It is also apparent that the particular matters treated of in the original section and the amendment are not the same. The former relate to proceedings in court to contest assessments and to annul drainage proceedings. The latter relates to the location of new drains upon the route of void or abandoned drains, the determination of the extent to which the new drain is benefited by the proceedings under former drains, and the payment for such benefits. From this dissimilarity in the provisions in the original section and the amendment counsel for the appellants concludes that the amendment is invalid, and within the inhibition of section 61 of the state constitution, which reads as follows: "No bill shall embrace more than one subject, which shall be expressed in its title, * * *" This section has been construed by this court in a number of cases, and its purposes and determination fully set forth. See *State* v. *Woodmansee,* 1 N. D. 246, 46 N. W. Rep. 970, 11 L. R. A. 420; *State* v. *Haas,* 2 N. D. 202, 50 N. W. Rep. 254; *State* v. *Nomland,* 3 N. D. 427, 57 N. W. Rep. 85, 44 Am. St. Rep. 572; *Richard* v. *Stark Co.,* 8 N. D. 392, 79 N. W. Rep. 863; *Power* v. *Kitching,* 10 N. D. 254, 86 N. W. Rep. 737; *Divet* v. *Richland Co.,* 8 N. D. 65, 76 N. W. Rep. 993; *Paine* v. *Dickey Co.,* 8 N. D. 581, 80 N. W. Rep. 770. For the purpose of this case it is sufficient to say that the requirement that a bill shall embrace but one subject of legislation, and that that subject shall be expressed in the title of the bill, is mandatory, and to repeat the following language used by this court in *State* v. *North Dakota Children's Home Soc.,* 10 N. D. 493, 88 N. W. Rep. 273, in referring to this section: "The constitution only requires that the act shall contain a single subject or object of legislation, and that subject or object shall be expressed in the title. It is not intended, neither is it required, that the separate means or instrumentalities necessary to accomplish the object of legislation shall be embodied in separate acts. 'Such a requirement would be absurd, rendering legislative acts fragmentary, and they would often fail of their intended effect from the inherent difficulty of expressing the legislative will when restricted to such narrow bounds.'" The title involved in this case is that of an amendatory, and not an original, act. Eliminating all reference to other sections amended by it, the title of the act is: "An act to amend section 1466, Revised Codes, relating to the establishment, construction and maintenance of drains."

Appellants' counsel contends, in substance, that section 61 of the state constitution, before quoted, prohibits an amendment to a section

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of a statute when the subject-matter of the amendment differs from the subject-matter contained in the section amended, even though the amendment relates to the same subject of legislation, and is within the title of the act amended. The cases are in confusion upon this point, and the conflict does not entirely arise because of differences in the constitutional provisions upon which they are based. The position of appellants' counsel has the support of a number of cases. We are of opinion, however, that the better reason and the best-considered cases, including those under constitutions like our own, are against this view, and are to the effect that a section of a statute may be amended so as to include provisions which are not directly related to those embraced in the original section, provided the new provisions are germane to the subject of the act amended as expressed in its title. The purpose of section 61, supra, is to limit the scope of every act to one subject of legislation, whether it be an original or an amendatory act, and we are unable to see that it is violated if the provisions of the amendment are germane to the subject of the act amended and the purpose to amend it is sufficiently disclosed in the title of the amendatory act. The precise character of the proposed amendment is required to be disclosed by section 64 of the constitution, which requires that it must be published at length as amended. This section—and it is not found in many of the states from which decisions are cited in support of appellants' contention—reads as follows: "No bill shall be revised or amended, nor the provisions thereof extended or incorporated in any other bill by reference to its title only, but so much thereof as is revised, amended or extended or so incorporated shall be re-enacted and published at length." This section, by requiring publication of the section as amended, affords the same protection to the members of the legislature and to the public against surreptitious legislation by way of amendment as is afforded by section 61, which requires the subject of legislation to be expressed in the title of the act. In California the provisions of sections 61 and 64, supra, are combined in one section,—article 4, § 24, Const. 1879, The precise question we are considering has been before the supreme court of that state in a number of cases. In the case of *San Francisco & N. P. R. Co.* v. *State Board of Equalization,* 60 Cal. 12, that court said: "It has been repeatedly assumed here that under the present constitution a title expressing the object of an act to be 'to amend section——' of a named act, 'relating to' the particular object treated of in the body of the act, was a compliance with section 24, art. 4. The title of the act now under consideration shows that the sections added are to be added to the Political Code, and relate to the object already mentioned." In the next case before that court—*People* v. *Parvin,* 74 Cal. 549, 16 Pac. Rep. 490—the court said: "With reference to a statute passed since the constitution of 1879 took effect, there can be no doubt that a section of such a statute, the statute in itself being properly entitled, may be amended by referring in the title of the

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amendment to the title of the act amended, and re-enacted as amended. If, in such cases, the title of the original statute did not state its subject, both the statute and any amendment of it would be void; but it is enough if the title of the statute is recited. It is not necessary that the subject of the particular section amended shall be stated in the title of the amendatory act. It is to be understood, of course, that, if any subject shall be embraced in a section in an act passed under the present constitution which shall not be expressed in the title of the act, the section is void. It follows, also, that under pretense of amending a particular section the legislature cannot legislate upon a subject not embraced in the title of the original act. * * * It would sometinmes give fuller notice to the members of the legislature if the title of a bill for amending a section of the act embraced a statement of the matter contained in the appropriate headnote, or its equivalent. * * * But the constitution only requires that the title of the act which it is proposed to amend shall be clearly mentioned or recited in the act amending a particular section. This being done, the sufficiency of the title of the amendatory act depends upon the sufficiency of the title of the original act." The title involved in the above case was, "An act to amend section 3481 of the Political Code." The above case was followed in *People* v. *Dobbins*, 73 Cal. 257, 14 Pac. Rep. 860. The test in that state is whether the amendment is embraced within the title of the act amended. In re *Werner*, 129 Cal. 567, 62 Pac. Rep. 97. The supreme court of Missouri, in construing a constitutional provision of that state in all respects like section 61, supra, in *City of St. Louis* v. *Tiefel*, 42 Mo. 578-590, said: "While the clause was embodied in the organic law for the protection of the state and the legislature, it was not designed to be unnecessarily restrictive in its operation, nor to embarress legislation by compelling a needless multiplication of separate bills. It was only the intention to prevent the conjoining in the same act of incongruous matters and of subjects having no legitimate connection or relation to each other. If the title of an original act is sufficient to embrace the provisions contained in an amendatory act, it will be good, and it need not be inquired whether the title of the amendatory act would of itself be sufficient. *Brandon* v. *State*, 16 Ind. 197." *State* v. *Mead*, 71 Mo. 267, is to the same effect. The constitution of Indiana contains provisions almost identical with sections 61 and 64. The supreme court of that state, in *Brandon* v. *State*, 16 Ind. 197 held that, if the title of the original act is sufficient to embrace the provision in question, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient. See, also, *State* v. *Bowers*, 14 Ind. 195. Also, *Shoemaker* v. *Smith*, 37 Ind. 122. The last case is important in holding that the different provisions contained in different sections of an act, all having a common subject, are not to be regarded as so many different subjects, but as having reference to only one general subject. See, also, *Improvement Co.* v. *Arnold*, 46 Wis. 214-225, 49 N. W Rep. 971; *Phillips* v. *Town of Albany*, 28 Wis. 340; *Wheeler* v. *State*, 23 Ga. 9.

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In this case it is not and cannot be contended that the title and subject of the original act, of which the amended section is a part, is not sufficiently designated in the title of the amendatory act wherein the several sections amended are described as "relating to the establishment, construction and maintenance of drains," which is, to all intents and purposes, the title of the original act; and, as we have seen, the provisions contained in the amended act are germane to the subject of the original act as expressed in its title. This is all the constitution requires. The following cases may be cited as supporting the views advanced by the appellants' counsel: *Harland* v. *Territory* (Wash. T.) 13 Pac. Rep. 453; *State* v. *Tibbets*, 52 Neb. 228, 71 N. W. Rep. 990, 66 Am. St. 492; *State* v. *Bowen*, 54 Neb. 211, 74 N. W. Rep. 615; *State* v. *Cornell* (Neb.) 74 N. W. Rep. 432; *Armstrong* v. *Mayer* (Neb.) 83 N. W. Rep. 401; *Miller* v. *Hurford*, 11 Neb. 377, 9 N. W. Rep. 477; *Ex parte Cowert*, 92 Ala. 94, 9 South. Rep. 225; *Ex parte Hewlett* (Nev.) 40 Pac. Rep. 96. Several of the Nebraska cases above cited go to the full extent of holding that "no amendment is permissible which is not germane to the subject-matter of the particular original section purposed to be changed." These decisions are based upon a constitutional provision different from our own, but not so dissimilar as to account for the conclusion reached. It is apparent that the fallacy in all these cases lies in erroneously assuming that a section of an act is an independent subject of legislation within the meaning of the constitution. Section 61, supra, requires that no bill shall contain more than one subject of legislation, but it has been repeatedly and properly held that the body of the act may contain numerous provisions embodied in different sections, provided only they all relate to the one subject of legislation expressed in the title of the bill. If each separate section of a statute can be said to contain a subject of legislation within the meaning of section 61, it must be of necessity the subject to which all of the various provisions relate, for the reason that, if each section has a subject of its own, and that subject is to be determined wholly by the matter contained in the section, it would, in that event, be necessary to enact each section separately, for otherwise an act embracing more than one section would contain more than one subject of legislation, and fall within the prohibition of section 61. This was not the intention of our constitution makers. A construction which leads to such absurd results cannot be sustained.

The appellants also attack the constitutionality of section 31, c. 51, Laws 1895, now known as "section 1474, Rev. Codes," which authorizes the board of county commissioners to issue interest-bearing bonds, payable in not to exceed 20 years, in such sums as may be necessary, to defray the expense of procuring the right of way and constructing the drain, to be paid out of the revenues derived from the assessment of benefits, and to divide the assessments into as many parts as the bonds have years to run; and further authorizes said board to negotiate the same at not less than par for the

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benefit of the persons interested in the drain. It is claimed that under this section the landowner who is assessed is or may be deprived of his property without due process of law, contrary to the fourteenth amendment of the federal constitution. This contention cannot be sustained. The contention of appellants' counsel that "no man can be compelled to pay interest or penalties on taxes or assessments until the amount has been legally charged against him or his property, and until he has had an opportunity to pay the same," has no application to the facts of this case. It has been held in cases where the legislature attempted to authorize a reassessment of real or personal property omitted from the tax rolls without fault of the taxpayer, not only for the amount of the original tax, but including the interest and penalties accruing during the omission, that acts authorizing such reassessments, while not repugnant to the constitutional provision that property shall not be taken without due process of law when a subsequent opportunity for defending in court was afforded, nevertheless are invalid, so far as they relate to back interest and penalties, as being unequal taxation, for the reason that until the amount of the tax is ascertained the owner has no opportunity of paying it, and is not in default, and a person is chargeable with interest only upon his contract to pay it, or for some default of legal duty on his part. *State* v. *Certain Lands in Redwood County* (Minn.) 42 N. W. Rep. 473; *Agens* v. *Mayor,* etc., 37 N. J. Law, 39. We have no such state of facts in this case. The statute in question merely authorizes the county commissioners, acting on behalf of the persons interested in the drain, to provide means for paying the cost of the construction of the same by issuance of bonds, and to postpone the time of payment by dividing the assessments required to pay such cost of construction into as many equal parts as the bonds have years to run. When the assessments are charged against their lands, the owners may pay the same without interest or penalty if they see fit to do so. No authority is cited to the effect that it is beyond the power of the legislature to provide for payment for the construction of drains by the issuance of bonds, and to distribute the assessments as authorized by the section in question. It is a power very frequently conferred and exercised, and, so far as we are informed, it is not open to any constitutional objection. See *Hellman* v. *Shoulters* (Cal.) 44 Pac. Rep. 915; *Davidson* v. *City of New Orleans,* 96 U. S. 100, 24 L. Ed. 618; *Bauman* v. *Ross,* 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *Martin* v. *Tyler,* 4 N. D. 289, 60 N. W. Rep. 392, 25 L. R. A. 838; *Irrigation Dist.* v. *Bradley,* 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *People* v. *Swigert* (Ill.) 22 N. E. Rep. 787.

But appellants further contend that the assessments are void because of certain alleged irregularities in the proceedings, to which we will next refer, and that they are, therefore, entitled to the relief which they seek in this action. It is claimed that: (1) "The right of way deeds are void"; that (2) "the assessment notice was not in proper form, and was not legally posted or published"; that (3) "the

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lands of the plaintiffs were assessed for the benefits to a school section and to some forty-two other sections unjustly omitted from the assessment"; that (4) "the drain is of no special benefit to the plaintiffs; it adds nothing to the value of their lands"; and that (5) "forty-one thousand dollars, the cost of the drain, and the basis of assessment levied, includes many excessive and many illegal charges." Considering these questions in their order, we may say that it is entirely unnecessary to determine whether the fact that the right of way deeds which are objected to because they run to "the people of Cass county," instead of "Cass county," impairs their validity as conveyances. The deeds were executed and delivered by the grantors for the purpose of conveying the right of way for the drain in question, and possession was given thereunder to the county, which it still retains. The drain was constructed, and a large sum of money expended, in reliance upon such deeds, and no question as to their legal sufficiency has been raised through any direct proceedings by any of the grantors. It is entirely clear that they would be estopped from doing so by the facts recited, and it is equally clear that these plaintiffs cannot question their validity in this collateral way. If the deeds are in fact defective, or insufficient in form and substance, they nevertheless furnish a sufficient basis, in connection with the foregoing facts, to require the execution of conveyances sufficient in form through the aid of a court of equity.

Neither can the objection to the form of the notice of assessment and the sufficiency of the posting and publication of such notices be sustained. The record shows that the notice was published in a newspaper of general circulation ten days prior to the hearing, and five printed copies of such notice were posted in the township traversed by the drain at such points as were likely, in the opinion of the board of drain commisisoners, to secure the greatest publicity for such notices. This was a full compliance with the statute. No form of notice is prescribed by the statute. The form of notice prepared by the board is merely criticized as containing more details than was necessary. If such is the fact, it constitutes no just ground of complaint that the board exercised its judgment on the side of safety.

Neither does the fact that school section No. 16, Wiser township, which lies adjacent to the drain in question, and concededly is benefited by it, was not assessed, furnish any legal ground for complaint. Being school land, it was not assessable, under sections 153, 158 and 163 of the state constitution. This tract is a portion of the lands granted by the United States to the state in trust for school purposes. The provisions of the grant and its acceptance forbid the imposition of assessments. In *Edgerton* v. *School Tp.* (Ind. Sup.) 26 N. E. Rep. 156, the court, in considering this question in a case where a drainage assessment was sought to be imposed, said: "It will thus be seen that these lands came to us as a sacred trust, to be applied exclusively to school purposes, and that the people, by their fundamental law, have placed it beyond the power of even the legis-

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lature of the state to make any provision by which the principal of the funds arising from such lands shall be diminished. The state has no power to tax such lands, for, if it were permitted to do so, it could tax them out of existence, and divert them to the use of the state in the payment of ordinary expenses; * * * and * * * assessments should be made against such lands only as are subject to taxation." See, also, *City of Chicago* v. *People,* 80 Ill. 384; *People* v. *Trustees of Schools of Tp. 19* (Ill.) 7 N. E. Rep. 262.

The question as to whether the plaintiffs' lands were benefited by the construction of the drain to the amount of their assessment, and whether other assessable lands were omitted from the assessment, is one we cannot consider. There is no allegation or evidence to the effect that in including or excluding any lands from the assessment the board acted fraudulently. If the facts are as appellants claim they merely establish errors of judgment in the tribunal clothed with authority to pass upon the question of benefits. The legislature had the undoubted power to commit to the drainage board the ascertainment of the lands to be assessed, as well as the apportionment of benefits; and it is well settled that the decisions of such boards on questions within their jurisdiction are not open to collateral attack, and, "if not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment." *Stanley* v. *Board,* 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Bauman* v. *Ross,* 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270-289; *Railroad Co.* v. *Backus,* 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Davidson* v. *City of New Orleans,* 96 U. S. 97, 24 L. Ed. 616; *Board* v. *Tregea,* 88 Cal. 334, 26 Pac. Rep. 237; *Irrigation Dist.* v. *Bradley,* 164 U. S. 167, 17 Sup. Ct. 56, 41 L. Ed. 369; In *re Prospect Park & C. I. R. Co.,* 85 N. Y. 489. We find that the jurisdiction of the board to act was established by the filing of a sufficient petition for the construction of the drain. As has been seen, the hearing upon assessments provided by the statute meets the requirements of due process of law. Due notice of the hearing was given, and the appellants were thus afforded an opportunity of contesting their assessments before the tribunal created by law to pass upon the same. The jurisdiction of the board being established and there being no claim of fraud, its determination must, therefore, be accepted as conclusive. See *Shuttuck* v. *Smith,* 6 N. D. 56, 69 N. W. Rep. 5, and cases cited.

Neither do we find that charges for unauthorized items were included in the cost of the drain, as alleged by appellants. The items objected to are bridges, attorneys' fees, interest, incidental expenses, publishing notices, clerks' fees, office rent, furniture, printing, books, and supplies. It is patent that a work of the magnitude of this ditch might very properly involve expenditures such as are objected to. It was plainly the intention of the legislature to provide for the allowance and inclusion of all items of expense which would fairly contribute to the establishment, construction, and maintenance of drains, —a course which is absolutely necessary under any practical drain-

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age law. Drains cannot be constructed unless funds are provided to pay such expenses as properly enter into their construction, and no other source exists for obtaining funds than assessments of benefits. Section 1466, Rev. Codes, provides that the cost of the drain shall include all the expense of locating and establishing the same, including the cost of the right of way, the drain commissioners' fees, cost of survey, cost of building bridges and culverts, interest on warrants issued or to be issued, amount of the contracts, and "all other expenses." This section is broad enough to include all of the items to which appellants object, and all of which we find contributed to the establishment and construction of the drain, and were, therefore, legitimate charges to be contracted for and allowed by the board in the exercise of a sound and reasonable discretion. Whether the sums allowed in each instance were correct, we need not inquire. They met the approval of the tribunal created by law to pass upon them. The board acted within its jurisdiction in making the allowances, and there is no claim that they acted fraudulently. That the items were proper expenditures cannot be doubted. See *Butler* v. *City of Toledo,* 5 Ohio St. 225. It hardly need be said that the authority of drainage boards is not arbitrary or unlimited, and that landowners and others interested are not remediless against usurpations of jurisdiction. They may invoke the same remedies against attempted usurpations of authority as are available as against other inferior boards acting in excess of their jurisdiction.

It is also claimed that the act under consideration authorizes assessments for benefits arising from the construction of drains which are conjectural or speculative, and that it is, therefore, invalid. No time need be spent on this point. Section 1452, Rev. Codes, which is the governing section, will not admit of any such construction. This section authorizes assessments against lands for benefits to accrue "either directly or indirectly by reason of the construction of such drain, whether such lands are immediately drained thereby, or can be drained only by the construction of other and connecting drains." It requires no argument to show that benefits from the immediate draining of lands are not speculative, and it is well settled that the benefits afforded for draining lands through connecting or lateral drains are special, and not speculative, and will support assessments. "Where the construction of a large drain enables property owners to carry their lateral ditches into it, and thus secure good drainage without encroaching upon the rights of others, there is special benefit." *Lipes* v. *Hand,* 104 Ind. 503.

The conclusion necessarily follows, from what has already been said, from which it appears that the proceedings of the drainage board were under a valid law, and were not invalid for irregularities or for jurisdictional reasons, that the plaintiffs must fail in this action.

Another reason, which lies at the very foundation of the relief sought, compels the same conclusion. The plaintiffs have united their interests in one complaint, and are seeking the aid of a court of

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equity to defeat the collection of assessments imposed upon their lands, and to have the entire proceedings of the drainage board declared void, and of no effect. The facts of this case are such as to require a denial of this relief on purely equitable grounds. It appears that 27 of the plaintiffs signed the petition which induced the location and construction of the drain. Five of them executed conveyances of the right of way for the drain, and were paid therefor. Two of them had a contract for constructing one-half mile of it. The drain is 10 miles in length, and its construction necessarily covered a considerable period of time, and, as we have seen, involved the expenditure of large sums of money and the contracting of many obligations. The period of time covered and the character of the work being done makes it necessary to assume that the plaintiffs whose lands are adjacent to the ditch were fully cognizant of all these facts. No steps of any kind were taken by any of the plaintiffs to arrest the progress of the work, or to challenge its legality in court, by notice to the board or to contractors, or otherwise. This action was not instituted until the drain had been fully completed, and after all of the benefits accruing therefrom had been conferred. Under such circumstances a court of equity will not stop to inquire into questions of regularity or irregularity. The cases are numerous, and the courts unanimous, we believe, in denying equitable relief on facts such as are here presented. In *Kellogg* v. *Ely,* 15 Ohio St. 64, which was an action to restrain drainage assessments on the ground that the proceedings were irregular and ilegal, the court said: "We do not find it necessary to determine any one of the many questions made and argued by counsel in the case as to the legality or illegality of the proceedings by which this ditch was established, because, if we take for granted all that plaintiff's appeal claims in this respect, we are of opinion that he does not make such a case as to entitle him to a remedy by injunction at the hands of a court of equity. It is not for every threatened violation of the legal rights of a party that a court of equity will interpose with its preventive remedy by injunction, even in a case where that remedy would be efficient. A party appealing to a court of equity must make a case which can commend itself to the conscience of the court. * * * It does not appear from the record that he ever warned the contractors or laborers that he intended for himself to resist the collection of the assessment which must follow to raise the money to pay them, but, remaining inactive and silent until his swamp lands were drained by a ditch of nearly a mile in length, he then for the first time asks the interposition of a court of equity. We think he comes too late,"—citing *Wiggin* v. *Mayor,* etc., 9 Paige, 24. In *Patterson* v. *Baumer,* 43 Iowa, 477, the court said: "While the work of constructing the ditch was undertaken because demanded by the public interests, yet the petitioners, being landowners in the vicinity of the improvement, were interested therein. They must all be presumed to have had notice of the action of the county in ordering the work and in causing it to be prosecuted. Some of them signed the petition to the supervisors

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asking that the work be done. They cannot be presumed to have been ignorant of any irregularities up to and including the letting of the contract. They should have objected thereto before the expenditure of money and labor by the county and contractor. The law will not permit them to remain silent until after the work is done, and then raise such objections to defeat the collection of taxes,"—citing *Kellogg* v. *Ely,* 15 Ohio St. 64; *Weber* v. *City of San Francisco,* 1 Cal. 455; *Motz* v. *City of Detroit,* 18 Mich. 495; *City of Evansville* v. *Pfisterer,* 34 Ind. 36, 7 Am. Rep. 214; *City of Lafayette* v. *Fowler,* Id. 140; *Sleeper* v. *Bullen,* 6 Kan. 300. In *McCoy* v. *Able,* 131 Ind. 417, 30 N. E. Rep. 528, 31 N. E. Rep. 453, it is said: "Principle and authority forbid that property owners should be allowed to stand by inactive and passive until after the work has been done, and then come in and take from the contractor the value of his work and materials without compensation. For such persons the law has no very tender regard." In *Prezinger* v. *Harness,* 114 Ind., 491, 16 N. E. Rep. 495, the same court said: "The authorities fully justify the statement that, where an improvement is made under color of statutory proceedings, unless such proceedings be so totally and palpably void that the person who made the improvement or performed the work must have proceeded with a degree of recklessness that amounted to bad faith, the property owner who stood by and received the benefits assessed against his property will be estopped to assert the invalidity of the proceedings without first paying or offering to pay the benefits." Again, in *Board* v. *Plotner* (Ind. Sup.) 48 N. E. 635, the same court said: "It is a general rule, now fully accepted in this state, that, where an owner of property subject to assessment for public improvements stands by and makes no objection to such improvements which benefit his property, he may not deny the authority by which the improvements are made, or defeat the assessment made against his property for the benefits derived; and this is true both where the proceedings for the improvement so had are irregular and where their validity is denied, but color of law exists for the proceedings."—citing a long list of authorities. In *Motz* v. *City of Detroit,* 18 Mich. 495,—which is a case where several taxpayers who had petitioned to have a street paved, and then sought to enjoin the assessment of their property,—it was held that their failure to complain or object to the contractors must be taken to show assent to the proceedings which led to the assessment; that, whether such assessment was legal or not, the facts furnished no ground for the interposition of a court of equity to restrain the assessment by injunction. Cooley, J., who wrote the opinion, said: "Under these circumstances they must be taken to have been willing and actively consenting parties to all the proceedings which led to the assessment, and to have impliedly, at least, consented that such assessment should be made. Whether, therefore, the assessment is legally void or not, there is not the least ground on their part for claiming the interposition of a court of equity by its extraordinary process of injunction to stay the collection of the assessment. Their remedy, if any, is

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strictly legal." The cases also hold that, where one has received benefits under an unconstitutional law, a court of equity will not aid him to escape payment by reason thereof, and this upon the ground that he is estopped by the receipt of the benefits from denying its constitutionality. See *Vickery* v. *Blair* (Ind. Sup.) 32 N. E. Rep. 881, and cases cited. On the general doctrine that a person who passively allows the work of constructing a drain to proceed with full knowledge that he is to be assessed therefor, and that compensation for the work can be provided in no other way than by assesment for benefits, is estopped from restraining the collection of the assessment, see the following cases: *Atwell* v. *Barnes* (Mich.) 66 N. W. Rep. 583; *Hall* v. *Slaybaugh* (Mich.) 37 N. W. Rep. 545; *People* v. *Drain Com'rs of Wayne Co.*, 40 Mich. 745; *Commisioners* v. *Krauss* (Ohio) 42 N. E. Rep. 831; *Byram* v. *City of Detroit*, 50 Mich. 56, 12 N. W. Rep. 912, 14 N. W. Rep. 698; *Lundbom* v. *City of Manistee*, 93 Mich. 170, 53 N. W. Rep. 161; *Goodwillie* v. *City of Detroit*, 103 Mich. 283, 61 N. W. Rep. 526; *Gillett* v. *McLaughlin* (Mich.) 37 N. W. Rep. 551; *City of Burlington* v. *Gilbert*, 31 Iowa, 356, 7 Am. Rep. 143. In considering a case resting upon a state of facts similar to those in the case at bar, the supreme court of Michigan, in *Smith* v. *Carlow*, 72 N. W. Rep. 22, said: "This drain is now constructed. All parties to the proceeding acted in good faith. There is no evidence of fraud. The entire proceedings were open and notorious, and evidently were known to most, if not all, whose lands were affected. The courts were open to them to contest its validity before the contractors had performed the work under their contract. The commissioners decided that it was a public necessity. Whatever advantage it is to the pubilc has been reaped. It is just that the contractors be paid, and courts should compel payment unless some insurmountable obstacle stands in the way. We think this case comes clearly within many other decisions of this court which hold that, when parties stand by and see such improvements made, and take no steps to impeach their validity, they are estopped to raise their validity when called upon to pay for them." In *City of Seattle* v. *Hill* (Wash.) 62 Pac. Rep. 446, in which certain taxpayers sought to restrain the collection of assesments levied for street improvements, the court said: "We are constrained to hold that, after a person has signed a petition for an improvement, which can only be paid for by means of an assessment on contiguous property, he is estopped from contesting the validity of the assessment; especially after the work has been completed, and accepted by the proper authorities. Cooley, Tax'n, p. 819; *Ball* v. *City of Tacoma*, 9 Wash. 592, 38 Pac. Rep. 133; *Motz* v. *City of Detroit*, 18 Mich. 495; *Wood* v. *Norwood Tp.*, 52 Mich. 32, 17 N. W. Rep. 229; *Ricketts* v. *Spraker*, 77 Ind. 371; *Patterson* v. *Baumer*, 43 Iowa, 477; *Ferson's Appeal*, 96 Pa. 140; Elliott, Roads & S. 423." In the recent case of *Conde* v. *City of Schenectady* (N. Y.) 58 N. E. Rep. 130, it was held that a petitioner for a street improvement was estopped from asserting that the statute under which the improvement was made was un-

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constitutional. The court said: "The plaintiff was one of the petitioners for the improvement. The only power the city had in the premises was to do the work at the cost of the abutting owners, to be apportioned among them according to frontage. He necessarily asked that the work be done under that statutory rule, and thereby waived any question as to its constitutionality. A party may waive the benefit of a constitutional provision in his favor. *Vose* v. *Cockcroft*, 44 N. Y. 415." We are of opinion, therefore, that, under the general doctrine that persons who petition for the construction of a public improvement to be paid for by assessments, and stand silently by and permit the work to proceed and money to be expended without objection, will not be heard to allege the invalidity of the proceedings in a court of equity for the purpose of defeating the assessments,—and it is a just doctrine,—the plaintiffs in this case are not entitled to the relief sought.

One further question remains for consideration. The trial court directed that the sum of $750 be taxed as an additional attorney's fee against the plaintiffs and appellants. Counsel for appellants claims that this allowance was made without authority of law. It is not contended that the amount allowed was unreasonable. The sole contention is that chapter 25 of the Laws of 1901, which affords the only legal authority for making such an allowance, is unconstitutional. Two grounds are urged against its validity. One only need be considered. It is urged that the subject of the act authorizing the taxation of additional attorneys' fees against plaintiffs in such cases is not expressed in its title. The title of the act is as follows: "An act to provide for the allowance and taxation of costs and additional attorneys' fees against the defendants in actions to enjoin drainage proceedings, or the levy and collection of taxes and assessments therefor." The body of the act contains no reference whatever to the taxation of additional attorneys' fees against defendants. On the contrary, it provides only for the allowance of additional attorneys' fees against plaintiffs, and that is its entire scope; whereas the title of the act expressly limits it to the taxation against defendants. It will thus be observed that the subject of legislation contained in the body of the act, which is the allowance and taxation of attorneys' fees against plaintiffs, is not expressed in the title of the act. The act is therefore clearly within the inhibition of section 61 of the state constitution, which requires that no bill shall embrace more than one subject, which shall be expressed in its title, and it must, therefore, fall. It has been repeatedly held by this court that the requirement that the subject of an act shall be expressed in its title is mandatory. See cases cited supra. Counsel for respondents do not contend otherwise. Their contention is that "the use of the word 'defendants' in the title of the act, instead of 'plaintiffs,' was plainly the result of inadvertence, and such errors are always disregarded." It does not admit of doubt that in construing statutes courts will disregard obvious errors, when the legislative intent is certain. We know of no case, however, in a state having constitutional provisions

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like our own, where errors in titles have been established as such and corrected solely by reference to the contents and language of the act itself. In *State* v. *Lake City,* 25 Minn. 404, it was held that the use of the words "Village of Lake City" in the title of an act, instead of the words "Town of Lake City," was an inadvertence which the court would correct. The decision is based, however, upon the sole ground that the error in the title was apparent from facts of which the court could take judicial cognizance, namely, of the political and municipal subdivisions of the state, and upon the further ground that by reason of certain facts narrated in the opinion, which were said to be of general common knowledge, no one, either within or without the legislature, could have been misled in regard to the purpose of the legislation as thus indicated by its title. In *State* v. *McCracken,* 42 Tex. 383, an error in the title was held harmless, and was corrected. The act was entitled, "An act to amend an act entitled 'An act to adopt and establish a penal code for the state of Texas, approved August 26th, A. D. 1871.'" Texas never had but one Penal Code, and that was approved on the 26th of August, 1856. Of this fact the court took judicial notice, and sustained the act upon the ground that the mistake "would be known as a mistake or misprint, and therefore no one could be misled by it to his prejudice." In *People* v. *Supervisors of Onondaga Tp.,* 16 Mich. 254, a majority of the court sustained an act wherein the words "county tax" were erroneously substituted for the words "bounty tax" in the title when the bill was submitted to and signed by the governor. The conclusion of the majority of the court was based upon the ground that there was no error in the title when it was submitted to and passed by the legislature, and that they therefore could not have been misled. To this conclusion, however, Cooley, J., did not agree, and in a separate opinion said: "I am not prepared to say that an act of the legislature can be valid which, as engrossed for the signature of the governor, would be void if passed by the legislature in that form. A law must have the concurrence of the three branches of the legislative department; and if it differs in an essential particular, when presented to the governor for his signature, from the bill passed by the two houses, there is difficulty in saying that it has been concurred in by all. *Prescott* v. *Board,* 19 Ill. 324. And under our constitution the title is not only important, but it is absolutely made to control; so that I do not see how any important change in the title can be said to be immaterial." Section 61 of our constitution makes the title of paramount importance. Its function is to indicate to the public and the legislature the subject of legislation contained in the act. As has been seen, errors in titles are not necessarily always fatal. When they are obvious from an inspection of the title, or when an inadvertence is apparent from facts which courts and the public are bound to know, and it is apparent that the error could not have misled either the legislature or the public, and the true intent is certain,

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the error will be disregarded. But we cannot concede that words or language appearing in titles can be established as inadvertently used, and corrected as such, solely by reference to the contents of the act. Such a doctrine would utterly destroy the safeguards afforded by the requirement that the subject of legislation shall be expressed in the title, and thus make the act, instead of the title, controlling as to the subject of legislation. There are no facts of which we can take judicial notice, neither are there any reasons suggested by an inspection of this title which disclose that the word "defendants" was inserted in the title inadvertently. The title, as it reads, clearly expresses a subject of legislation. The subject of legislation embodied in the act is an entirely different one, and is not expressed in the title. The error in the use of the word "defendants," if error it was, appeared in the bill as originally introduced, and was perpetuated through its passage and final approval. Under these circumstances we have no reason for saying, and cannot say, that no one within or without the legislature was misled by the error in the title. It follows, therefore, that the allowance of the additional attorneys' fees in the sum of $750 in the taxation of costs was without authority of law, and the same will be stricken from the judgment.

This is a case where the awarding of costs rests in the discretion of this court. As we have seen, the respondents have prevailed upon all of the issues tendered in the action. The error in the allowance of the additional attorneys' fees, which is the only point upon which the appellants prevail, is a subsidiary question, and appellants have prevailed as to it purely upon technical grounds. The costs incurred in presenting that question are insignificant as compared with the questions involved upon which the appellants fail. The entire portion of the appellants' printed abstract and brief on the matter of the attorneys' fees covers but 15 of the 300 printed pages, and no more extensive record than is embraced in these 15 pages would have been required to present that question had the appeal from the judgment been taken for that purpose alone. Taking all these facts into consideration we are constrained to hold that the respondents should recover their costs and disbursements in this court, and it is so ordered.

As above modified, the judgment of the district court will be in all things affirmed. All concur.

(92 N. W. Rep. 841.)

TURNQUIST *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal—Review—Constitutionality of Statute.

Courts will not inquire into and determine the constitutionality of statutory provisions at the instance of persons who are not interested or affected by such provisions. State v. Donovan, 86 N. W. Rep. 709, 10 N. D. 203, followed.

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Drain Commissioners.

The authority of members of a board of drain commissioners is joint, and, under the provisions of section 5140, Rev. Codes, a majority of the members of such board constitute a quorum legally competent to act. It is accordingly *held*, in an action to enjoin the collection of certain assessments laid by the board of drain commissioners of Cass county to defray the cost of constructing two certain drains, that the fact that a part of the proceedings relating to such drains were taken by only two members of the board does not affect their validity.

Determination of Board Conclusive.

It is also *held* in this action, in which it is undisputed that the board acquired jurisdiction to construct the drains by the filing of proper petitions therefor, and that due notice of the hearing of the review of assessments was given, there being no allegation of fraud, that the determination of the board upon the assessment of benefits is conclusive. Erickson v. Cass Co., 92 N. W. Rep. 841, 11 N. D. 494, followed.

Estoppel.

It is further *held*, on the facts stated in the opinion, that the plaintiff is estopped from alleging the invalidity of the proceedings of the dainage board in a court of equity for the purpose of enjoining the collection of assessments.

Chapter 25, Laws 1901, Unconstitutional.

Chapter 25, Laws 1901, which provides for the allowance and taxation of an additional attorney's fee against plaintiffs in actions to enjoin drainage assessments, is unconstitutional and void, for the reason that the subject of the act is not expressed in its title. Erickson v. Cass Co., 92 N. W. Rep. 841, 11 N. D. 494, followed.

Appeal from District Court, Cass county; *Pollock*, J.

Action by Andrew Turnquist against the Cass county drain commissioners and others. Judgment for defendants, and plaintiff appeals. Affirmed.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

YOUNG, J. This is one of nineteen cases instituted in the district court of Cass county by the owners of real estate to vacate and enjoin certain assessments made by the drain commissioners of that county upon their lands to defray the cost of constructing two drains known as "Rush River Drain No. 12" and "Harwood Drain No. 2." The cases were consolidated in the district court for the purpose of trial, pursuant to a stipulation of counsel, which was made of record in each case, and under the terms of which the right to a separate appeal was reserved to each of the several plaintiffs. The trial court denied the relief sought, and entered judgment in each of said actions in favor of the defendants, and awarded to them an attorneys' fee of $85 in each case, in addition to the regular statutory costs. Thirteen of said plaintiffs perfected appeals to this court, and the same are

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now pending for determination upon a demand for trials de novo. A statement of case is on file in each case. The statements are identical, each containing all the evidence offered at the trial of the 19 cases as consolidated. The complaints in the several actions are the same, except as to the names of the parties plaintiff, descriptions of land assessed, and amounts of the assessments. The judgments entered by the trial court are the same in all the cases. In this case the appellant, Andrew Turnquist, has served and filed a printed abstract, which contains all of the evidence offered at the trial as consolidated, and has also filed a printed brief under the statute and rules of this court. No printed abstract or briefs were served or filed in the other 12 cases, in which Nels Peterson, Ole Monson, Robert J. Percy, as guardian, Robert J. Percy, Swan Monson, Ellen B. Potter, A. F. Anderson, James Thompson, Andrew Hagman, Eric Peterson, Charles P. Safe, and Charles F. Anderson are appellants. Counsel for respondents waived the filing of such abstracts and briefs, and by stipulation of counsel, on file in each case, and with the consent of this court, the abstract and brief on file in this case is accepted as a proper record for the determination of the other 12 appeals. The questions involved in the cases are the same. No facts are pointed out in the brief which distinguish the other cases in any way from this case. The decision of this case will, therefore, control the decision in each of the other 12 appeals.

The complaint alleges four separate grounds as a basis for the relief sought. They are as follows: (1) That the order establishing the drains, and all subsequent acts of the board of drain commissioners, were void, "for the reason that said board failed to examine personally the line of the proposed drain before the passage of the said order, as required by section 1447, c. 79, Laws 1899"; (2) that the assessments are illegal for the reason that the board "failed to give the notice for the review of such assessments, as prescribed in section 1454, c. 79, Laws 1899, and that they failed to publish said notices in a newspaper of general circulation in the county, and that they failed to post five printed notices of the time and place of such review, as required by such section 1454"; (3) that the board of drain commissioners included in the cost of Rush River drain No. 12 certain sums which had been expended upon "Rush River drain No. 1," which was a former and abandoned drain; and (4) that the plaintiff's lands are not benefited. The defendants' answer denied each of the foregoing allegations, and alleged that the plaintiff is estopped from obtaining relief at the hands of a court of equity, for reasons to which we will hereafter refer; and further alleged that the assessments sought to be enjoined had been passed upon and determined by a competent and lawful tribunal, viz., the board of drain commisisoners, and upon due notice to all persons assessed. Upon the issues thus presented the trial court found: (1) "That the drain commisisoners examined the line of said drain before establishing the same"; (2) "that they gave notice of the review of the assessments in conformity with the law"; (3) "that the drain commissioners did not include in

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the expense of the construction of Rush River drain No. 12 any expense of Rush River drain No. 1"; (4) "that the lands of the plaintiff are benefited directly and indirectly by Rush River drain No. 12 and Harwood drain No. 2"; (5) "that the plaintiff knew that said drains were being constructed, but the plaintiff failed to take any steps to interfere with the construction of said drains, and allowed the said Rush River drain to be constructed at a cost of $12,500, and the Harwood drain No. 2 at a cost of $14,700"; (6) "that the defendants are entitled to recover from the plaintiff a reasonable sum as attorneys' fee in the sum of $85, in addition to the costs and disbursements allowed by law." The court concluded, as matter of law, that the assessments were valid, and, further, that the plaintiff is estopped from alleging the invalidity of such assessments for the purpose of defeating the collection of the same.

This case was argued and submitted with the case of *Erickson* v. *Cass Co.*, 11 N. D. 494, 92 N. W. Rep. 841. That case related to assessments made to defray the cost of Argusville drain No. 13, and involved a determination of many of the questions presented in this case. The reasons adopted to sustain our conclusions are fully set forth in the opinion just handed down in that case, and need not be restated at length.

Turning now to the consideration of the questions urged upon this appeal, we may say that counsel for appellant does not contend in his brief that the trial court erred in finding that the board inspected the route of the drain, or in finding that the statutory notice of hearing upon assessments was given, or in finding that no part of the cost of the prior abandoned drain was included in the cost of the drains here in question; neither does counsel attack the correctness of the finding that plaintiff's lands are benefited. On the contrary, counsel relies upon legal questions only. They are as follows: (1) The unconstitutionality of certain provisions of the drainage law; (2) the alleged invalidity of the assessments, "because two members of the board of drain commissioners only acted with reference to many important matters"; (3) the unconstitutionality of chapter 25, Laws 1901, authorizing the allowance of additional attorneys' fees. The particular parts of the law claimed to be unconstitutional, so far as they relate to the attack upon the assessments, are section 1474, Rev. Codes, which authorizes the issuance of drainage bonds, and the amendment to section 1466, Rev. Codes, contained in chapter 79, Laws 1899, which authorizes drainage boards to locate and construct drains upon the routes of abandoned and invalid drains, and to allow compensation therefor to the extent that the abandoned or invalid drains contribute to the construction of the new drain. Neither of these questions properly arises in this or the other 12 cases submitted with it. Payment of the cost of both drains here in question was provided for by a single assessment. No bonds were issued or contemplated. Neither did the cost of either drain, as determined by the drainage board, include any sum allowed upon the cost of abandoned drains. The provisions, therefore, of which appellant complains, do not affect him in

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any way. It is well settled that "courts will not inquire into and determine the constitutionality of statutory provisions at the instance of parties who are not interested or affected by such provisions." See *State* v. *Donovan,* 10 N. D. 203, 86 N. W. Rep. 709, and cases cited. Also, *Chicago, M. & St. P. Ry. Co.* v. *Cass Co.,* 8 N. D. 18, 76 N. W. Rep. 239. We may say, however, that both section 1474 and chapter 79, Laws 1899, were involved and considered in the case of *Erickson* v. *Cass Co.,* supra, and, upon mature deliberation, their validity was sustained against the objections which the appellant seeks to urge in this action.

Neither do we think that the question as to whether the proceedings of the drainage board were in all instances taken by the full board, or only by a majority thereof, is involved in this case under the pleadings. If, however, but two members acted, as counsel for appellant claims, that fact would not impair the validity of their acts. The board of drain commisisoners is made by statute to consist of three members. Their authority is joint. Whether a majority would constitute a quorum authorized to act, in the absence of an express statutory provision to that effect, we need not inquire. Any doubt which might exist on this point is removed by section 5140, Rev. Codes, which provides that "words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving authority." In no part of the entire drainage law is it required that the acts of the board shall be taken by all of the members. Upon this point see *Draining Co.* v. *Craighead,* 28 Ind. 274; *People* v. *Harrington,* 63 Cal. 257.

It is not disputed that the petitions for the drains involved in this case were legally sufficient, and, as we have seen, the trial court found that the statutory notice of hearing upon assessments was given, and that finding is not controverted by the appellant. The assessments sought to be enjoined were made by the tribunal created by law and clothed with authority to make the same, and to pass upon the question of benefits. There is no allegation of fraud, and the determination of the board must, therefore, be accepted as conclusive. The plaintiff has failed to sustain the allegations of his complaint, and must fail.

Equitable considerations, independent of all questions of regularity in the proceedings of the board of drain commissioners, compel the same conclusion. We agree with the conclusion of the trial court that the plaintiff is estopped from alleging the invalidity of his assessment, and this applies to each of the other 12 cases. It is shown that this plaintiff petitioned for the drain, and the same is true of the plaintiffs in nine of the other cases. Some of them signed as many as five petitions, which were presented to the board at different intervals covering several years. All of the plaintiffs must be assumed to have known of the construction of the drains during their progress, and that the cost of construction could be paid only by assessments. No steps were taken to warn the contractors or laborers, and no pro-

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ceedings were instituted to restrain the progress of the work of construction. On the contrary, they remained silent, and permitted large sums of money to be expended without objection or protest. Thus the drains were constructed either under the direct inducement of the petition signed by plaintiffs, or under circumstances which were equivalent to their consent. These actions were not instituted until after the drains were completed, and the benefits arising therefrom had been conferred. To such persons a court of equity will not extend its remedy by injunction to prevent the collection of assessments necessary to defray the expense which they have thus induced or permitted to be incurred. The facts of this and the other 12 cases bring them, we think, under the decision just handed down in *Erickson* v. *Cass Co.*, wherein we held that: "A court of equity will not extend its extraordinary remedy of injunction to prevent the collection of assessments for benefits imposed to pay the cost of constructing drains, when the parties seeking such relief have been actively or impliedly consenting parties to its construction and to the proceedings which led to the assessments, whether such assessments are legally valid or not; and in such action parties who have petitioned for and induced the construction of drains cannot be heard to question either the constitutionality of the law under which the drain was constructed, or the legality of the proceedings taken thereunder, for the purpose of defeating their assessments."

One further question remains. It is contended that the allowance of the additional attorneys' fee in the taxation of costs was without authority of law. This contention must be sustained. The only authority for such an allowance is found in chapter 25, Laws 1901. The validity of that act was involved in *Erickson* v. *Cass Co.*, before referred to. We there held that it was unconstitutional for the reason that the subject of the act is not expressed in its title. That conclusion we adhere to. The inclusion of the additional attorneys' fee of $85 was, therefore, error. That item will be stricken from the judgment, and, as thus modified, the judgment of the district court is in all things affirmed. The respondents, having prevailed upon all of the merits, will recover their costs and disbursements in this court. All concur.

(92 N. W. Rep. 852.)

A. F. ANDERSON *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock*, J.

Action by A. F. Anderson against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals. Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as

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those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disburse-bursements in this court.

(92 N. W. Rep. 1133.)

CHARLES F. ANDERSON *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock*, J.

Action by Charles F. Anderson against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disburse-bursements in this court.

(92 N. W. Rep. 1133.)

ANDREW HAGMAN *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock*, J.

Action by Andrew Hagman against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

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PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disbursebursements in this court.

(92 N. W. Rep. 1133.)

OLE MONSON *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock,* J.

Action by Ole Monson against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disbursebursements in this court.

(92 N. W. Rep. 1133.)

SWAN MONSON *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock,* J.

Action by Swan Monson against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

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Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disbursebursements in this court.

(92 N. W. Rep. 1133.)

ROBERT J. PERCY *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock,* J.

Action by Robert J. Percy against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disbursebursements in this court.

(92 N. W. Rep. 1133.)

ROBERT J. PERCY *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock,* J.

Action by Robert J. Percy, as guardian, against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

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Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disbursebursements in this court.

(92 N. W. Rep. 1133.)

ERIC PETERSON *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock,* J.

Action by Eric Peterson against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disbursebursements in this court.

(92 N. W. Rep. 1134.)

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NELS PETERSON *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock,* J.

Action by Nels Peterson against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disbursebursements in this court.

(92 N. W. Rep. 1134.)

ELLEN B. POTTER *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock,* J.

Action by Ellen B. Potter against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disbursebursements in this court.

(92 N. W. Rep. 1134.)

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CHARLES P. SAFE *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock,* J.

Action by Charles P. Safe against the Cass County Drain Commissioners ond others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disburse-bursements in this court.

(92 N. W. Rep. 1134.)

JAMES THOMPSON *v.* CASS COUNTY DRAIN COM'RS *et al.*

Appeal from District Court, Cass County; *Charles A. Pollock,* J.

Action by James Thompson against the Cass County Drain Commissioners and others. Judgment for defendants, and plaintiff appeals.

Modified.

M. A. Hildreth, for appellant.

Ball, Watson & Maclay, for respondents.

PER CURIAM. The questions involved in this case are the same as those presented and determined in the case of *Turnquist* v. *Commissioners* (in which an opinion has just been handed down) 11 N. D. 514, 92 N. W. Rep. 852. The decision in that case is in all respects controlling. It follows, therefore, that the judgment of the district court upon the merits must be affirmed. The allowance of an additional attorney's fee against plaintiff in the taxation of costs, however, was error, and the same is ordered stricken from the judgment. As thus modified, the judgment of the district court will be in all things affirmed. Respondents will recover their costs and disburse-bursements in this court.

(92 N. W. Rep. 1134.)

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IN RE SIMPSON.

Court Has Power to Reinstate an Attorney.

A court which has the power to suspend or disbar an attorney also has the power to reinstate, upon proper and satisfactory proof that, as a result of his discipline, he has become a fit and proper person to be intrusted with the office of an attorney.

Proof Must be Sufficient to Overcome Former Adverse Judgment.

Upon an application for reinstatement, the mere formal proof of good moral character required upon an original application for admission is not enough; but the proof must be of a satisfactory character, and of sufficient weight to overcome the former adverse judgment as to the applicant's character.

Disbarred Attorney Reinstated.

The applicant was disbarred by this court on July 12, 1900, for unprofessional conduct. A motion for his reinstatement is made, based upon the report of a committee of the State Bar Association appointed by this court to investigate the present character of the applicant, and his fitness for reinstatement, and upon the testimony taken by said committee and embodied in its report, from which it appears that the applicant sincerely regrets his acts of misconduct, and that there are no unsettled financial obligations connected therewith, and, further, that since the date of his disbarment his conduct has been that of an exemplary citizen. *Held*, upon this showing, that the applicant should be restored to practice.

In the matter of Leslie A. Simpson. Motion to reinstate attorney. Granted.

YOUNG, C. J. On the 1st day of September, 1902, term of this court, a motion was made by Honorable Tracy R. Bangs and Honorable John M. Cochrane for the reinstatement of Leslie A. Simpson, who was disbarred for unprofessional conduct by an order of this court dated July 12, 1900. The disbarment proceedings are reported in 9 N. D. 379, 83 N. W. Rep. 541. A similar motion for reinstatement was made at the September, 1901, term of court, and was denied. On the former motion no proof which we could judicially consider was offered, either to contradict or to excuse the unprofessional acts upon which the order of disbarment was based, or to show that the applicant for reinstatement had so altered in character, as a result of the discipline to which he had been subjected, as to render him fit to be intrusted with the privileges pertaining to the office of attorney and counselor at law of this state. The court, however, while denying the motion, at the same term, in a communication from Chief Justice Wallin, directed to the Honorable Seth Newman, president of the State Bar Association, referred the application to said association, and requested that body to conduct an investigation, through its proper officers, touching the present character and fitness of Mr. Simpson to be reinstated, and to report to this court upon the following matters of fact: "(1) To what extent, if at all, has Mr. Simpson

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engaged in the practice of the law since the entry of the judgment of disbarment? (2) Is there any tangible evidence that the severe discipline to which Mr. Simpson has been subjected has had the effect of producing a change of his character, in such a way that he would, if readmitted to the practice of law, conduct himself hereafter with reference to proper ethical and professional standards of conduct? (3) Has Mr. Simpson been so far humbled by the discipline of disbarment that he is willing, freely and without reservation, to admit upon the records of this court that he was guilty of the offenses charged against him, and that in disbarring him the court proceeded upon proper grounds and with the proper motives? (4) Does Mr. Simpson sincerely regret his attitude and conduct towards the court and opposing counsel, as manifested during the progress of the disbarment proceedings? (5) Are there any financial obligations, growing out of the subject-matter of the charges against Mr. Simpson, which remain undischarged?" The committee of the bar association charged with the duty of conducting the investigation was composed of the Honorable Roderick Rose, the Honorable Charles F. Templeton, and the Honorable P. H. Rourke. This committee convened at Dickinson, in Stark county, where the applicant resides, and, upon notice to the attorneys who appeared in the original proceedings, heard and received all evidence offered; and the same, which was reduced to writing and verified by the witnesses, is contained in the report filed in this court. The committee's report is as follows: "That Mr. Simpson has not engaged in the practice of law since July 12, 1900, when the judgment of disbarment was entered against him. That the discipline to which he has been subjected has produced such a change in his character as to ensure proper professional conduct on his part in the future, if readmitted to the practice of law. That Mr. Simpson has been humbled by the discipline of disbarment he has received, and that he has willingly, freely, and without reservation, admitted in writing, under oath, that in disbarring him the court proceeded upon proper grounds and with proper motives. * * * That Mr. Simpson sincerely regrets his attitude and conduct towards the court and opposing counsel, as manifested during the progress of the disbarment proceedings. That we are unable to learn of any financial obligations growing out of the subject-matter of the charges against Mr. Simpson which remain undischarged. Your committee therefore respectfully recommend that the court take further proceedings in the matter, and that Mr. Simpson be readmitted to practice law in the state of North Dakota. Dated June 21st, 1902. [Signed] Roderick Rose, P. H. Rourke, Charles F. Templeton, Committee." The present motion for reinstatement is based upon the foregoing report, and the evidence therein contained. The motion was argued orally by counsel for the applicant, and resisted by counsel who represented the prosecution in the original disbarment proceedings. Subsequent to the argument a written statement was filed by the Honorable James Donovan, Attorney General of Montana, attorney for the Holter Lumber Company, stating that

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said company has no claim or demand against the applicant arising out of his misconduct in connection with the collections referred to in the opinion filed in the disbarment proceedings.

That a court which has the power to suspend or disbar an attorney has also the power to reinstate him cannot be doubted. That power, was exercised by this court in the reinstatement of Taylor Crum, and it has been frequently recognized and exercised by the courts of other states. In *re Newton* (Mont.) 70 Pac. Rep. 982; In *re Treadwell*, 114 Cal. 24, 45 Pac. Rep. 993; In *re King*, 54 Ohio St. 415, 43 N. E. Rep. 686; In *re Boone* (C. C.) 90 Fed. Rep. 793; In *re Harris* (N. J. Sup.) 49 Atl. Rep. 728. In other words, courts recognize the possibility of reformation of character. The decisive question on such an application is whether the applicant is of good moral character, in the sense that phrase is used when applied to attorneys of law, and is a fit and proper person to be intrusted with the privileges of the office of an attorney. To establish this fact on an application for reinstatement, the mere formal proof of good character required upon an original application is not enough. Neither is a petition by attorneys, stating that, in their opinion, the applicant has been sufficiently punished. In *re Enright*, 69 Vt. 317, 37 Atl. Rep. 1046; In *re Pemberton* (Mont.) 63 Pac. Rep. 1043. The proof must be sufficient to overcome the court's former adverse judgment of the applicant's character.

In the present case the propriety and justice of the judgment of disbarment is not questioned; neither was it on the former motion. On the contrary it is admitted by the applicant. The motion is based entirely upon the ground that the applicant has reformed as a result of the discipline to which he has been subjected. On this point the affidavits of four reputable attorneys of this court, filed in support of the motion, state, from the personal knowledge of the affiants, that the applicant is of good moral character. Honorable W. H. Winchester, judge of the Sixth Judicial District, certifies that the applicant has at all times obeyed the order of the court, and since the order of disbarment has refrained from practice. This fact is also further sustained by the affidavits of C. E. Gregory, state's attorney of Stark county. The record filed by the committee of the bar association contains the testimony of over 60 witnesses who live in the community where the applicant resides, including city and county officials, bankers and merchants, and others, whose opportunity for judging the applicant's conduct and character cannot be doubted; and with unanimity and without hesitation they testify that since his disbarment, in July, 1900, the conduct of the applicant has been that of an exemplary citizen; that his reputation is good; that he is trustworthy and in all respects worthy of confidence. The members of the bar association committee, in addition to reporting upon the questions of fact submitted to them, have added to the report their endorsement, and, in conjunction with the eminent members of the bar who presented this motion, assure us that the applicant, as a result of the discipline already inflicted, has so altered in character that he will, if reinstated, conduct himself with fidelity to clients, courtesy to op-

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posing counsel and witnesses, and with proper respect for courts and the due administration of justice.

Upon this showing, we are constrained to grant the motion. In doing so we are influenced somewhat by the knowledge that the misconduct for which the applicant was disbarred resulted in a measure from inexperience and youthful indiscretion, as well as a radical misconception of his duty as an attorney, and, further, that it was induced largely by local sentiment which openly encouraged his violation of official duty. In our opinion, neither the ends of justice, nor the maintenance of a proper standard of legal ethics, require his further punishment.

It is proper to state that Chief Justice Wallin, who was a member of the court when Mr. Simpson was disbarred, as well as when the present motion was submitted, also desired his reinstatement at this time.

An order will be entered that the said Leslie A. Simpson be readmitted to practice law in all the courts of this state upon taking the oath of office.

MORGAN, J., concurs.

COCHRANE, J., having been of counsel, not participating.

(93 N.W. Rep. 918)

ANDREAS UELAND *v.* MICHAEL DEALY, *et al.*

Depositions—Exceptions.

In this action, pursuant to a stipulation between counsel, plaintiff took certain depositions, and the same were returned and filed with the clerk of the district court. Defendant's counsel, two days before the trial commenced, filed with the clerk an exception to said depositions, and alleged as ground of exception that "the depositions were not taken in proper time." This exception was not presented until the case was called for trial on the merits. *Held*, that the exception was insufficient, in this: that it did not specify wherein and in what particular the deposition was not taken in proper time.

Objection Insufficient.

It appears that the notary, in taking the dlepositions, adjourned over one whole day, and that was the true ground of the exception. *Held*, that the true ground of the objection to the deposition was not specified in the written exception filed with the clerk, and hence that the exception was insufficient, under section 5687, Rev. Codes 1899.

Technical Objection not Sustained when Prejudice not Shown.

No claim was made that the defendant attempted to appear before the notary who took the depositions, or desired to be present when the depositions were taken, and no evidence is submitted tending to show that the defendant was in anywise prejudiced by the adjournment to which he makes objection. *Held*, further, that an exception to a deposition, made on strictly technical grounds, should not be sustained in the absence of any showing of prejudice.

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Findings of Fact Sustained by the Evidence.

Evidence examined, and *held* that the findings of fact made and filed in the district court are sustained by the evidence.

Appeal from District Court, Rolette county, *D. E. Morgan,* J.

Action by Andreas Ueland, receiver of the Washington Bank, against Michael Dealy and S. A. Dealy. Judgemnt for plaintiff. Defendants appeal. Affirmed.

Bosard & Bosard, for appellants.

John Burke, for respondent.

WALLIN, C. J. This action is brought to foreclose a mortgage upon real estate which was given by the defendants to secure their note for $2,000, dated June 22, 1891, and made payable to the firm of Haugen, Johnson & Co., which note was transferred by the payees thereof to the Washington Bank of Minneapolis, which bank, having become insolvent, is now in the hands of Andreas Ueland, this plaintiff, as receiver. The action was tried without a jury, and is now in this court to be tried anew on all the issues.

Certain depositions were taken in behalf of the plaintiff under a stipulation made between counsel as follows: "It is hereby stipulated and agreed by and between the plaintiff and the defendants in the above-entitled action that the deposition of Andreas Ueland, John H. Field, and August Ekman, to be taken before Lewis R. Larson, a notary public, at his office at No. 1016 New York Life Building, in the city of Minneapolis, and state of Minnesota, on Monday, the 20th day of March, 1899, at 10 o'clock in the forenoon of the said day, and to continue from day to day until concluded. Said deposition to be used in the trial of said action." These depositions were taken and the same were on file with the clerk of the district court on December 21, 1899, at which date counsel for the defendants filed with said clerk certain objections to the depositions and to the reading thereof. The only objection which is now urged is couched in the following terms: "Said depositions were not taken at the proper time." This objection was not presented to the trial court until the case was called for trial on December 23, 1899. A proper disposition of the question of practice presented by this objection will require a brief reference to the provisions of the Code relating to depositions. Section 5687, Rev. Codes 1899, contains a special provision governing exceptions to depositions, and provides for two modes of taking such exceptions: Where the exception is on the ground of incompetency or irrelevancy, the same may be taken when the deposition is offered in evidence. As to other exceptions the statute provides as follows: "Other exceptions to a deposition must be made in writing, specifying the grounds of objection and filed in the cause before the commencement of the trial." The next section (section 5688) expressly authorizes the court "on motion of either party to hear and decide exceptions of this

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kind before the commencement of the trial." The obvious purpose of this last-cited provision of the Code is to facilitate the hearing before trial of exceptions to depositions, whether the same are substantial or merely technical. This policy of the statute is in furtherance of justice, inasmuch as great hardship and injustice might result if a deposition relied upon by counsel should for some reason, and perhaps for a purely technical one, be suppressed in the midst of a trial upon the merits. To avoid any such result, the courts of New York have established the rule that motions to suppress depositions will not be heard at the trial in cases where the objection is known, and where there was opportunity to make the objection before trial. See *Newton v. Porter,* 69 N. Y. 133, 25 Am. Rep. 152; *Wright v. Cabot,* 89 N. Y. 572. We think this wholesome rule should be applied in this state, and, if applied to the facts of this case, the objection to the depositions was presented for determination too late, inasmuch as it was not presented until the case was opened for trial on the merits, and this in a case when the objection to the depositions was known and filed at least two days prior to calling the case for trial. But upon the merits of the objection we regard the exception taken to the depositions as untenable. The objection is extremely technical in its character, and there is neither showing nor claim that defendants have been in any wise prejudiced in their substantial rights in the matter of taking the depositions. But we think the exception taken was too vague and general in its character, in this: that it omits to specify wherein the same was not "taken at the proper time." The statutory requirement is mandatory, and is obviously intended to compel the objecting party to point out and specify the precise ground and reason for the exception. The true reason and ground of the objection, as developed by appellants' counsel in his brief, is not named in the objection filed with the clerk of the district court, viz., that in the process of taking the deposition there was one adjournment extending over one whole day, and hence the adjournments were not from day to day, as the statute requires, and as was provided for in the stipulation of counsel, The specification filed omits any mention of the matter of the adjournments had in taking the several depositions. Hence the objection relied upon in this court omits to conform to the statutory requirement found in section 5687, *supra,* in this: that it omits to specify the ground of the objection. The objections filed are vague and general, and no one can gather from them wherein or in what particular the depositions were not taken at the "proper time." As a matter of fact, the depositions were not required, under the law or the stipulation, to be completed upon any particular day. The stipulation required that the depositions should be taken at the day and hour named, and that the matter could be adjourned from day to day. The record shows that the work of taking the depositions actually began at the day and hour named, and, not being completed on that day, the matter was adjourned to the following day, and upon the following day an adjournment was again taken over one full day,

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and was then finished. Defendants did not appear at any time, nor is it claimed that they attempted or desired to appear. But aside from the statute, the rule is well established that a motion to suppress a deposition must be specific in alleging the ground of the motion. If the ground is alleged vaguely and only in general terms, the motion to suppress will be denied. This rule is sustained by a decided preponderance of cases. See *Murray* v. *Phillips*, 59 Ind. 56; *Fitzpatrick* v. *Papa*, 89 Ind. 17; *Blunt* v. *Williams*, 27 Ark. 374; *Darby* v. *Heagerty* (Idaho) 13 Pac. Rep. 85. And see, generally, 6 Enc. Pl. & Prac. 587, 588, and *Morrill* v. *Moulton*, 40 Vt. 242. And this court has applied the rule that a purely technical objection to a deposition should be overruled, in the absence of any claim of prejudice. *Moore* v. *Booker*, 4 N. D. 543, 62 N. W. Rep. 607. Our conclusion is that the exception to the depositions is insufficient, and that the same must be overruled, and hence the depositions will be received in evidence.

This conclusion brings the court to a consideration of the merits of the case, and, upon the merits, counsel concede that the decision will necessarily turn wholly upon a single question of fact. That question, roughly stated, is whether the debt secured and intended to be secured by the mortgage above described has or has not been paid. It is the contention of the defendants' counsel that the same has been fully paid, and hence that the mortgage should be surrendered and canceled. On the other hand, it is the plaintiff's contention that the debt secured and intended to be secured by said mortgage has never been paid, and hence that the mortgage is and continues to be a valid and subsisting security for the debt. But to properly present this question a brief narration of certain uncontroverted facts becomes necessary. When the mortgage was executed and sent to the firm of Haugen, Johnson & Co., the owners of the Washington Bank of Minneapolis, the defendants were the owners of the lands, and were also the principal stockholders of the Bank of Rolla, N. D.; and it is conceded that the note and mortgage were made to obtain a credit for the Bank of Rolla. The $2,000 note and mortgage were sent to Minneapolis by mail, but the amount of the note was not advanced or loaned to the defendants; but later, and in the month of July, 1891, the defendants made their promissory note for $1,500 in favor of Haugen, Johnson & Co., due in four months, and drawing 8 per cent. interest, and delivered said note to said firm, whereupon it was expressly agreed that said note for $1,500 should be secured by said $2,000 note and mortgage, and the same were accordingly kept and retained as collateral to the loan evidenced by the $1,500 note. The point is in dispute, but we think the evidence shows that the defendants originally asked for a loan of $2,000, and that a loan for that amount was declined, whereupon the defendants accepted the loan evidenced by the $1,500 note, and then such loan was made, and the amount thereof ($1,500) was, at the defendants' request, credited on the books of the Washington Bank to the account of the Bank of Rolla. After this credit was opened, the Washington Bank and the Bank of Rolla continued to do business with each other, and their transactions were quite

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numerous and of considerable volume; and such transactions continued until a settlement was had between the banks on the 15th day of December, 1893, at which date there was a conceded balance of $4,600 due from the Bank of Rolla to the Washington Bank, and for which amount the Bank of Rolla on said date gave its note at four months; and there is no dispute as to the fact that the maker of the note, the Bank of Rolla, is now indebted to the plaintiff, as receiver, to the full amount of said note, with interest added. The whole controversy turns upon the question whether the note and mortgage for $2,000, which, concededly, were originally put up by the defendants as collateral to secure a loan of $1,500, was or was not, by agreement between the parties, to be retained by the Washington Bank as collateral security for any balance of indebtedness which might arise or become due from the Bank of Rolla to the Washington Bank. The evidence upon this crucial question of fact is very voluminous, and the same is likewise conflicting. The record shows that numerous notes were sent from the Bank of Rolla to the Washington Bank, and that some were returned, and that others which were secured had been collected by foreclosure proceedings; but it appears from the evidence that the original debt was never wiped out by actual payment, and that, on the contrary, the debt continued to increase in amount until the settlement on December 15th, at which time the settlement note for $4,600 was made and delivered. We have given proper consideration to the evidence contained in the record, and our conclusion is that the fact appears by a fair preponderance of the evidence that the $2,000 note and mortgage were, by an agreement between the parties, left with the plaintiff bank as collateral to secure that bank for any balance of indebtedness which might, in their dealings, arise or become due from the Bank of Rolla. The fact is in dispute, but we think the decided weight of the evidence tends to establish the fact that the Bank of Rolla did not, nor did the defendants, at any time prior to the commencement of this action, demand or request the plaintiff bank, or any of it officers or agents, to return the note and mortgage to the Bank of Rolla. This fact, standing alone, might not be of decisive importance. Nevertheless we deem it to be significant, as denoting the understanding existing between the two banks with reference to the custody of the $2,000 note and mortgage, and the purpose for which it was permitted for so long a period of time to remain in the custody of the Washington Bank.

The conclusion we have reached upon the decisive question of fact involved, viz., that the parties agreed that the $2,000 note and mortgage was to be kept and retained by the plaintiff as security, was likewise reached by the learned trial court, and embodied in its findings. We deem this fact to be of some weight, especially as this conclusion was reached by the court below after it had excluded from its consideration a large and material portion of the plaintiff's testimony, by sustaining the defendants' exceptions to the plaintiff's depositions. In this court, for reasons above given, we have overruled the defendants' exceptions and admitted all the evidence of the plaintiff which

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was excluded by the district court. The plaintiff's case, therefore, is much stronger upon the evidence before this court than it was as presented to the court below; and yet, as we have stated, the result is the same in both courts.

We find no error in the judgment entered in the trial court, and the same is therefore in all things affirmed. All the judges concurring.

MORGAN, J., having presided at the trial of the above-entitled case, took no part in the above decision; Judge FISK, of the First judicial district, sitting in his place by request.

(89 N.W. Rep. 325)

DULUTH ELEVATOR CO. *vs.* FRANK WHITE, *et al.*
IN RE DULUTH ELEVATOR CO.

Taxation—Certiorari—Mistaken Remedy—Not Proper Forum.

The plaintiff is the owner of certain grain elevators and warehouses situated in various counties in this state, and against which a tax, or a pretended tax, has been assessed for the year 1901 and spread upon the county tax records of said counties. As grounds for its application to this court for a writ, plaintiff alleges, in substance, that certain action was taken by the state board of equalization at its annual session in the year 1901, which action plaintiff alleges was illegal and of such a nature as to render the tax upon plaintiff's property wholly void. As a means of annulling said tax and defeating its collection, plaintiff prays for the issuance of said writ out of this court to bring up the record of the action of the state board at its said session of 1901, the attorney general of the state appearing in opposition to the motion. The application is denied, upon the sole ground that in applying to this court for the writ the palintiff has mistaken its remedy, and is not in the proper forum.

Private Rights, only, Involved—District Court Adequate.

The question presented in the moving papers for determination involves only private rights, i. e., the individual rights of a taxpayer seeking to cancel an illegal tax. The district court is adequate to afford full relief in such cases.

Jurisdiction of Supreme Court.

In this case the writ is not sought in aid of the appellate jurisdiction of this court, nor as a means of exercising supervisory control over any inferior court of this state; and in such cases the writs enumerated in section 87 of the state constitution will not, under established practice, issue out of this court otherwise than as prerogative writs, viz., in habeas corpus cases and in cases publici juris affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people, and in such cases this court will, upon the application, judge for itself whether the wrong complained of is one which demands the interposition of this court, and leave to issue the prerogative writ should in such cases be applied for by the attorney general.

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Application of the Duluth Elevator Company for a writ of certiorari to Frank White and others, members of the board of equalization. Writ denied.

Tracy R. Bangs, for plaintiff.

O. D. Comstock, Atty. Gen., for defendants.

WALLIN, C. J. In this proceeding application was made in plaintiff's behalf to the Honorable N. C. Young, a judge of this court, in vacation, to issue the writ of certiorari. The judge to whom the application was made denied the application to issue the writ without notice and a hearing, but plaintiff's counsel was given leave to make his application to the court upon notice of not less than 10 days given to the state auditor and the attorney general; whereupon, such notices having been given, the application to issue the writ came on to be heard before this court at a session which convened at Fargo on the 25th day of March, 1902, said counsel for both parties being present at the hearing.

The written motion for the writ is as follows: "Now comes the Duluth Elevator Company, plaintiff above named, by its attorney, Tracy R. Bangs, and, upon the affidavit of K. R. Guthrie, hereto attached, moves the court that a writ of certiorari do issue herein commanding the state board of equalization of the state of North Dakota to certify fully to this court at a specified time and place, and annex to said writ a transcript of the record of the proceedings of the said board had at the session of said board commencing on the 6th day of August, 1901, and terminating on the 15th day of August, 1901, together with the statement of the aggregate valuation of all real and personal property in the said state of North Dakota, as returned by the county auditors of the respective counties of said state to the state auditor in the said year 1901, that the same may be reviewed by the court. Dated, Grand Forks, No. Dak., March 6th, 1902." The grounds of the application are contained in an affidavit made by the general manager of the plaintiff, together with a copy of the record of the proceedings of the state board of equalization had at a session thereof which convened at the office of the state auditor on the 6th day of August, 1901.

It has become unnecessary, in the view taken of the case by this court, to detail the grounds of the application for the writ, as such grounds are set forth in the motion papers, further than to state that it appears that the plaintiff corporation is a taxpayer in this state, and that it owns and operates a number of grain elevators and warehouses, which are situated in various counties in this state; that the defendants collectively constitute the state board of equalization, and that said A. N. Carlblom is and was at said session the secretary of said board, and that the defendants were assembled and acted together as a board at said session thereof; that said Carlblom, as such secretary of the board, proceeded to certify the result of the action taken by said board at said session to the several county auditors of

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the state, and that the county auditors, pursuant to such certification, have severally extended the tax upon their tax duplicates in conformity with the action of the state board as embodied in the said certification of its secretary.

Said affidavit further sets out, in substance, that said state board, at its session in August, 1901, did not confine its action to a discharge of its statutory duties as a state board of equalization, but on the contrary, radically departed from its province and duty as a board of equalization, and proceeded unlawfully and in excess of its powers, and in manner and form as set out in the affidavit, to reassess and revalue the property of the state and increase the valuation of numerous classes of property, with which the board dealt separately and unlawfully, and that such reassessment and increase was made, not to produce uniformity of valuation as between counties, but was done as a means of enlarging the aggregate valuation of the property of the state as a basis of taxation; that said board of equalization, by its said action at said session in 1901, unlawfully raised the valuation of the property of the state for purposes of taxation to an amount exceeding $8,000,000 in excess of its proper aggregate value, as officially fixed by the several taxing officers and boards whose duty it is to officially value the property of the state for purposes of taxation; and that such unlawful action of the state board being certified to the several county auditors of the state, has had the result of unlawfully spreading upon the tax lists in all the counties of the state an unlawful tax, and that the said action of the state board resulted in an apparent tax upon said elevators and warehouses of the plaintiff, which tax is unlawful; and, upon the assumption that the action complained of was unlawful and without jurisdiction, the plaintiff asks that the writ of certiorari be issued to bring up the record of the action of the state board at its said session, with a view to the annulment of said alleged unlawful action which led up to the tax complained of. At the hearing before this court the entire matter was considered upon its merits, there being no substantial dispute as to any of the controlling facts of the case.

Something was said by counsel upon the oral argument as well as in their briefs as to the proper parties to a controversy such as this, the attorney general contending that the state should be made a party, while counsel for plaintiff insisted that the matter involved was simply a private controversy, in which a single taxpayer is endeavoring to resist and annul an unlawful tax assesed against its property. We fully agree with plaintiff's counsel as to this proposition. The controversy is not one in which the state, as such, is a party in interest. In this case the state can have no other or different interest than it has in any other case in which a taxpayer is seeking to defeat the unlawful action of taxing officers or boards and thus defeat an unlawful assessment upon his individual property. In such a controversy the statute in terms declares that the state need not be joined as a party plaintiff. Rev. Codes 1899, § 6096. In this case the plaintiff, as a result of this proceeding, asks only that the tax upon its property be canceled, and

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does not even assume or ask to champion the cause of any other taxpayer. We further agree with plaintiff's counsel that the manager of the plaintiff was, as plaintiff's representative, qualified to make the affidavit in behalf of the plaintiff, the party beneficially interested.

There was also some discussion as to the plaintiff's right to have recourse to the writ of certiorari as a remedy for the grievance complained of, and it was contended that plaintiff is not entitled to the writ, because it has a plain, speedy, and adequate remedy at law by means of a civil action. We regard this question as being fairly debatable, especially in this jurisdiction; but inasmuch as we are clear that the application must be denied upon an independent ground, we shall refrain from passing upon this point in the present case. Nevertheless, we are constrained to observe, in passing, that we do not see clearly how the plaintiff would derive any practical relief from a decision in its favor, if one could be made in this court in this proceeding. The state board completed its action in August, 1901, and the result of its action was promptly certified to the several county auditors, and the tax of 1901 was long ago spread upon the tax duplicates, and has long since been in process of collection. In fact it was admitted on the argument that more than 70 per cent. of that assessment has already been paid by the taxpayers of the state. In the nature of the case the state board, having completed its work for the year 1901, can take no further action respecting the taxes of that year, and if this court, by its judgment, should vacate and declare void its action, we fail to see how such judgment would be of practical value to the plaintiff. Such judgment would not, of course, be of binding force upon any tax collector, none of whom are parties to this proceeding. It would follow in the supposed case that further judicial proceedings would be necessary. In order to obtain practical relief we think it would be necessary to proceed against the taxing officers, who have possession of the taxing records, and especially against the collectors in the counties in which the plaintiff's property was taxed, and where the obnoxious tax records may be found. But, as already stated, the decision of the case at bar will turn upon an independent matter, and to this, the controlling feature of the case, we will now give our attention.

We have reached the conclusion that the application for the writ must be denied, and we shall place this ruling upon the ground that in applying to this court for relief in the first instance the plaintiff's counsel has mistaken his remedy. The supreme court of this state, under the state constitution, as repeatedly construed by this court, is not a proper tribunal for the initiation of causes involving only matters of mere private right. As has been shown, the plaintiff complains of an alleged unlawful tax upon its property, and in seeking the writ of certiorari the plaintiff's ultimate object is to annul the tax and thereby avoid its payment. The cause of action of the plaintiff therefore consists of an alleged unlawful invasion of the rights of the plaintiff, and the relief sought can go no further than to protect the rights of the plaintiff as an individual taxpayer. Actions for this purpose

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are very frequently instituted in the district courts of this state, but we think this is the first case ever atemped to be brought in the supreme court of the state for the sole purpose of relieving a taxpayer from the burden of an unlawful tax. The case is therefore important as a precedent, inasmuch as we know of no reason why any taxpayer of the state may not begin proceedings in this court for the annulment of an obnoxious tax, if the present proceeding can be upheld. But we have no difficulty, in the light of former adjudications, in reaching the conclusion that this proceeding cannot be sustained. It is true that under the provisions of section 87 of the state constitution this court has power to issue certain enumerated writs, among which is the writ of certiorari, and to hear and determine the same; but it is likewise true that under section 103 of the same instrument the district courts and the judges thereof have jurisdiction and power to issue the same writs and to hear and determine the same. Both courts therefore being clothed with power to issue the several writs named, the question is presented whether it was the intention of the framers of the constitution to confer upon the supreme and district courts concurrent jurisdiction in all cases where remedies are sought through the medium of the writs enumerated in the constitution. This question has twice received very careful consideration at the hands of this court, and a construction has been placed upon the several provisions of the organic law which has been adhered to ever since this court has been in existence. Briefly stated, the conclusion reached was to the effect that the constitution makers did not intend to give concurrent jurisdiction to the two courts with respect to the writs in question, but on the contrary, it was the intention to require all suitors to apply to the district courts when these writs, or either of them, is sought as a means of enforcing strictly private rights or the redress of private wrongs. On the other hand, the cases already decided by this court clearly lay down the rule (except where the writs are sought for in aid of the appellate jurisdiction of this court, or in the exercise of its supervisory control over inferior courts) that the writs in question will issue only as prerogative writs, and that in such cases the writs will not, as a rule, issue until leave therefor is granted upon the application of the attorney general of the state. What is meant by the phrase "prerogative writs" has been definitely stated and reiterated in the cases to which we refer, and which are cited below.

In the case of *State* v. *Nelson Co.*, 1 N. D. 88, 45 N. W. Rep. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609, the governing rule was stated as follows: "When the information makes out a *prima facie* case the writ will issue only in cases *publici juris* and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people. In such cases the court will judge for itself whether the wrong complained of is one which demands the interposition of this court." In the later case of *State* v. *Archibald*, 5 N. D. 359, 66 N. W. Rep. 234, the same question was involved, and was exhaustively considered by Corliss, J., who framed the opinion of the court. In the course of that opinion the rule as laid down in the *Nelson Co.*

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Case was approved, and the court quoted with approval the language of the supreme court of Wisconsin, in construing the same constitutional provision, in the case of *Attorney General* v. *City of Eau Claire,* 37 Wis. 400. The Wisconsin court said: "It is not enough to put in motion the original jurisdiction of this court that the question is *publici juris;* it should be a question *quod ad statum republicae pertinet,*—one 'affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.'"

In the Archibald Case this court, in somewhat different language, again laid down the line of demarkation which separates prerogative cases, or cases of which this court will take jurisdiction, from other cases embracing only private controversies, and in which the original jurisdiction of this court cannot be invoked as a means of initiating a judicial controversy. In that case the distinction was stated as follows: "To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or remote; peculiar perhaps to some subdivision of the state, but affecting the state at large, in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state, in its sovereign character; this court judging of the contingency in each case for itself. For all else, though raising questions *publici juris,* ordinary remedies and ordinary jurisdictions are adequate."

In this case, as already shown, the plaintiff's counsel has assumed, and correctly so, from the beginning, that the question presented for determination involved only the private rights of an individual taxpayer. There is no claim, and cannot be, that any question in the case impinges upon the sovereignty of the state, its franchises or prerogatives, or the liberties of its people. In line with the plaintiff's theory there has been no application made in this court by the attorney general for leave to issue the writ of certiorari as a prerogative writ, nor is it claimed that application has been made to that officer for any such purpose. On the contrary, plaintiff's counsel has assumed that a suitor in a case involving only private rights may initiate a case in this court at any time, and on his individual application, and as a matter of strict right. In this counsel is in error and has mistaken his forum. The facts in this record remove the case a long distance from any debatable border line on which this court can hesitate or pause to determine whether it should not assume original jurisdiction and issue the writ. The record discloses no fact or feature which takes the case out of the category of cases involving mere private rights.

Our conclusion is that the application for the writ must be denied, and this court will enter its order accordingly. All the judges concurring.

(90 N.W. Rep. 12)

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In re Voss.

State's Attorney—Duty of.

It is the duty of attorneys and counselors at law to maintain the respect due to courts of law, and to refrain from offensive language, either towards the court, counsel, or witnesses.

Violation of Duty.

A state's attorney who renders professional asistance to a defendant in a criminal action violates his duties as state's attorney and his duties as an attorney at law.

Frequenting Gambling Place a Violation of Official Oath.

A state's attorney, who, on several occasions, enters a public gambling house, and bets money on a roulette wheel, or gambles for money there, and wilfully refrains from informing and prosecuting the keeper of such place, is guilty of a misdemeanor involving moral turpitude, as such failure to inform and prosecute such keeper involves the violation of an official oath and the violation of the express command of section 7243, Rev. Codes 1899.

Justice of the Peace not Bound to Dismiss a Prosecution on Motion of State's Attorney.

A justice of the peace is not bound, as a matter of duty, to dismiss a prosecution of a criminal offense on motion of the state's attorney, although such a course may, in the absence of special circumstances or conditions known to him, be the better course to pursue.

Official Misconduct—Sufficient to Warrant Disbarment.

A state's attorney of this state who neglects to prosecute offenders against the prohibition law, when the proofs of such violations are furnished to him, is, under section 7620, Rev. Codes, guilty of a misdemeanor, and, such misdemeanor is one involving moral turpitude, authorizing disbarment or suspension. In re Simpson, 83 N. W. 541, 9 N. D. 379, followed.

Suspension from Practice—Evidence Sufficient.

Evidence in this case considered, and found to justify the suspension of the defendant from practising as an attorney at law, by virtue of his license, for neglect to prosecute to judgment proceedings instituted by him for the abatement of nuisances created by violations of the prohibition law of this state as enacted in chapter 63, Rev. Codes 1899.

Adverse Local Sentiment will not Excuse State's Attorney from Good Faith Attempt to Perform his Duty.

A state's attorney is not excused from performing his official duties as state's attorney because local sentiment largely predominates in favor of the nonenforcement of laws that have been violated, nor is he excused from in good faith attempting to perform such duties because convictions are difficut to obtain.

In the matter of the accusations against H. G. Voss, attorney and counselor at law. Judgment of suspension.

Newton & Smith, for prosecution.

Tracy R. Bangs and *E. C. Rice,* for defendant.

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MORGAN, J. In September, 1900, affidavits were presented to the Bar Association of this state, charging the defendant with violations of his duty and obligations as an attorney at law and as state's attorney of Morton county. The Bar Association appointed a committee, consisting of three of its prominent members, to investigate the charges contained in such affidavits and report thereon to such association. This committee subsequently presented its report to such association and presented to the supreme court an accusation against the said defendant, specifically charging him with misconduct as an attorney at law and as state's attorney, and asked that the supreme court order a judicial investigation of such charges in the manner provided by law. The accusation thus presented to the supreme court by such committee contained charges against said defendant as follows, to-wit: First. That in and during the month of January, 1898, there were certain persons and firms, to the number of about 12, engaged unlawfully in selling, furnishing, and giving away intoxicating liquors in the city of Mandan, in said Morton county, N. D., and unlawfully keeping and maintaining places where such unlawful sales, furnishings, and giving away were carried on and conducted in the said city and county, and to the knowledge of the said H. G. Voss, state's attorney aforesaid; that the names of such persons and firms are unknown to this committee, except as hereinbefore shown; that proceedings and prosecutions were and had been commenced against such persons and firms, under the provisions of the prohibition law of the state of North Dakota, by said H. G. Voss, then state's attorney of said Morton county, and were pending on the 6th day of January, 1898; that thereupon certain persons applied to the above-named H. G. Voss, he then and there being state's attorney of Morton county, for relief and protection against such prosecutions; that thereupon, on or about the 6th day of January, 1898, a meeting of certain citizens of said Morton county was held in said city of Mandan, at which meeting said H. G. Voss, then being state's attorney as aforesaid, was present and participated; that the said H. G. Voss, at such meeting, then and there informed the persons present, and advised, that upon the said persons and firms so engaged in unlawfully selling, furnishing, and giving away intoxicating liquors, as hereinbefore shown, and unlawfully keeping and maintaining places wherein such unlawful sales, furnishings, and giving away were carried on and conducted, paying the sum of $17.50 each, as and for certain expenses thereto-for and up to such time incurred by said Morton county or the officers, as the costs and expenses, and especially sheriff's fees, in such proceedings and prosecutions, such persons and firms so engaged in such unlawful selling, furnishing, and giving away intoxicating liquors, and being proceeded against as hereinbefore shown, should and would be relieved and protected from such proceedings, and their further prosecution discontinued; that thereupon a committee of residents of such Morton county, upon the advice of said H. G. Voss, he then and there being state's attorney, as above shown, was selected and authorized to collect of and from each of such persons and firms so

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engaged, as hereinbefore shown, in unlawfully selling, furnishing, and giving away intoxicating liquors, the said sum of $17.50 each; that thereupon said sums were collected of and from said persons and firms to the number of about 11, and from all such persons, and by them paid, except one, Herman Yunck; that said Herman Yunck refused to pay such sum, or any sum, on account of such purpose, or for the purpose hereinbefore shown; that thereafter the said proceedings and prosecutions of said persons and firms to the number of about 11, on account of such unlawful acts as hereinbefore shown, were thereupon dropped, and not further prosecuted by the said H. G. Voss, state's attorney as aforesaid, or otherwise, except that the proceeding and prosecution against said Herman Yunck was further pressed and moved by the said H. G. Voss, as state's attorney, but to what extent is unknown to this committee; that after and in pursuance to the proceedings hereinbefore shown the said persons so unlawfully engaged in selling, furnishing, and giving away intoxicating liquors unlawfully were permitted by the said H. G. Voss, as state's attorney as aforesaid, to continue such unlawful business, and so did. Second. That on or about the 17th day of June, 1895, there was a criminal complaint and action pending before Frank Wilder, Esq., a justice of the peace in and for said Morton county, N. D., against one William Churchill, wherein such William Churchill was charged with threatening to shoot one Louis Goeschel with a loaded revolver and deadly weapon; that the said H. G. Voss, then being state's attorney in and for said Morton county, as hereinbefore shown, acted in regard to such complaint and action and charge against said William Churchill, as counsel and adviser of such William Churchill, and as attorney for him therein; that the said Louis Goeschel was the complaining witness in such complaint, action, and proceeding, and was compelled and did then and there employ an attorney, viz., B. W. Shaw, Esq., to conduct the prosecution thereof, and that said B. W. Shaw, Esq., did so conduct such prosecution; that the said William Churchill was by such justice held to answer in the district court for such a crime, and that thereupon the said H. G. Voss, then being state's attorney as aforesaid, with great vehemence and openly and publicly did advise the said William Churchill to repeat such offense; that thereafter the said William Churchill did further assault such Louis Goeschel with a revolver, and then and there shot at said Louis Goeschel three times with the same; that the said William Churchill was then and there under bonds to keep the peace as provided by law, which bonds the said Justice Wilder had required of such William Churchill to give in that behalf at the hearing of the complaint and action first hereinbefore mentioned; that thereupon, and after the assault upon and shooting at said Louis Goeschel by said William Churchill, as hereinbefore shown, which said acts were in violation of the conditions of his bond to keep the peace, the said H. G. Voss, then being state's attorney of Morton county, refused to prosecute the said William Churchill, criminally or otherwise, for his said conduct hereinbefore shown, or to proceed upon his bond

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given as hereinbefore shown, and neglected so to do, and that such matters were never inquired of or prosecuted otherwise than as hereinbefore shown. Third. That during the years of 1896, 1897, and 1898, one George McDonald was residing at Mandan, Morton county, N. D., and engaged in the occupation of keeping and maintaining a building wherein gambling and games of chance were unlawfully carried on and conducted and indulged in as a business; that the said George McDonald and his said unlawful business and the building and rooms wherein the same was carried on and conducted were during said time known to and patronized by the said H. G. Voss, he then and there being state's attorney of said Morton county; that frequently during said years the said H. G. Voss, then and there being state's attorney, resorted to such building and place, and then and there and therein played at games of chance, and gambled and won and lost large sums of money thereat; that such games of chance so carried on and conducted by said George McDonald, as hereinbefore shown and participated in by the said H. G. Voss, he then and there being state's attorney of said Morton county, as aforesaid, so far as known by this committee, were the games designated and known as "roulette," and "playing at craps"; that during all of such time the said H. G. Voss, then being state's attorney, received from such George McDonald large sums of money, either as a consideration for not prosecuting the said George McDonald, or as sums won at the said games of chance, and upon such gambling schemes as were then and there carried on; that the said George McDonald was not prosecuted, nor did the said H. G. Voss prosecute or in any way enforce the law of the state of North Dakota against gambling, but, on the contrary thereof, encouraged and permitted such evil and misdemeanor, and for a consideration either directly paid to him by said McDonald or won by him in the practice of gambling or by resort to games of chance." This court, after the filing of such accusation with the clerk of this court and presenting to same to the court appointed the clerk of this court as referee to take the testimony on such investigation of such charges, and the Bar Association duly appointed Hon. George W. Newton to conduct such investigation before the referee and to present the matter of the disbarment of the defendant to the supreme court, after the taking of the testimony had been completed before the referee.

The defendant answered the charges and specifications preferred against him by such committee, and therein denied specifically all such charges of misconduct on his part, and averred that he had performed his duty as state's attorney and as attorney at law faithfully and conscientiously, as the same appeared to him under the laws of the state. At the outset the attorney for the prosecution frankly admits that there is no evidence in the record showing or tending to show that the defendant ever received, nor was he paid, any money or property or anything of value from any person with a view or for the purpose of wrongfully influencing his official conduct as state's attorney. Hence the misconduct urged by the prosecution as grounds for the suspension or

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discipline of the accused is confined to his action pertaining to the injunction suits brought by Mr. Voss and which were the subject-matter of the meeting of some of the citizens of Morton county at his office early in January, 1898; and (2) his failure to inform against one McDonald for keeping a gambling place after full knowledge that such a place was maintained by such McDonald; (3) misconduct as state's attorney in the conduct of the cases of State against Churchill and State against Churchill and Goeschel. The testimony taken before the referee is voluminous, but there is an absence of contradiction, so far as the material facts are concerned, and the case will be disposed of upon testimony that is practically undisputed.

In January, 1898, Mr. Voss, as state's attorney, commenced 10 or 12 actions to abate nuisances alleged to have been created by the defendants therein by the unlawful sale of intoxicating liquors in places unlawfully kept by them for such sales, and for unlawfully keeping liquors for sale in such places. These actions were brought under section 7605, Rev. Codes 1899, by the state, on the relation of one Christ Christianson, who was a representative of the State Enforcement League of North Dakota. An injunction and a search warrant were issued by the judge of the district court, and a search at each place was made at the time the papers were served. Such search did not result in the finding of any intoxicating liquors, and the places searched were not therefore closed by the sheriff. The papers were placed in the hands of the sheriff by Mr. Voss in the afternoon of the day on which the judge issued the orders, and were served by the sheriff on the same day. The sheriff's fees for such searches and service of the papers amounted to nearly $200, and he presented his bill therefor to Mr. Voss, for his approval thereof, before it was presented to the board of county commissioners for allowance. Mr. Voss refused to approve of the bills, claiming that the county was not liable for their payment until judgment had been rendered against the county. The sheriff then went to the secretary of the Citizens' Protective Association of Mandan to consult with him concerning the payment of his fees. This association is composed of the business men of Mandan. It was organized for the purpose of furthering the business interests of the city of Mandan, and had a membership of 67 business men. Mr. Voss was not a member of such association. A large majority of this association was opposed to the enforcement of the prohibition law in Mandan, and favored a license system and protection from prosecution, under which the city derived a revenue from those engaged in the unlawful sale of beverages. Pursuant to the interview of the sheriff with the secretary of this association, as to the payment of his bill for serving the papers in these actions, the secretary called a meeting of the association, and a meeting thereof was immediately held in a room back of the secretary's store. At this meeting the question of the payment of the sheriff's fees was considered, and it was there decided to call upon Mr. Voss to ascertain why he objected to the sheriff's bills being paid by the county. They called upon Mr. Voss on the following day, when Mr. Voss explained

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to them why he objected to the payment by the county of such fees. He there gave the same reasons that he had previously given the sheriff, viz., that the county was not liable until a judgment of dismissal had been rendered in the actions. Thereupon a general discussion followed as to the course to be pursued in reference to the actions and the payment of the sheriff's fees. Some favored that the law should take its course, and that the actions be prosecuted; others favored no prosecutions of the actions; others favored that the county should pay the costs; others that the defendants should pay them. Mr. Voss was not present during the whole hour during which this meeting lasted, he having been called away and remained out until the meeting had closed and the parties were dispersing. At this meeting the sheriff's bill was corrected, as it contained overcharges, and Mr. Voss read from the statute what the legal fees were for the various items included in the sheriff's bill. He also stated that the sheriff had found no intoxicating liquors on the search, and that he had no evidence warranting the closing of the places. At this meeting it was decided that the defendants in these actions must pay the sheriff's fees, and it was there decided that each defendant must pay $17.50. It was understood, as the general sentiment of the meeting, that in case any defendant paid such sum that his case would be dropped, and in case any defendant refused to pay such sum the action was to be prosecuted against him. No witness states that Mr. Voss was a party to such proposed action nor made any promises to drop the actions. He states that he made no promises to drop the actions, and that no one asked him to do so. He does state that he was not aware that defendants paid such costs until some time thereafter. However, a committee was appointed at this meeting to collect such sum from each of the defendants, and all of them paid such sum, excepting one defendant, who refused, and his place was closed, but not under instructions from Mr. Voss. The front door was locked, but such defendant remained in possession, and had access to his building through a side entrance. Mr. Voss never took any further action whatever in these actions.

It is our conclusion that he acquiesced in the action of the meeting at his office, and, in conformity to the sentiment and wishes of the majority at that meeting, took no further action on the cases, and did not intend to. We cannot find from a reading of the evidence that he did not know that it was the sentiment of that meeting that the prosecutions should be dropped and discontinued. The attendance at this meeting was 14. It lasted one hour. There was much discussion. Mr. Voss participated in such discussion while present, and he was present a considerable portion of the time. Mr. Voss knew that the county was not thereafter asked to pay such fees, and must have known that the reason for ascertaining the correct amount of such fees in each case was that it was intended by the meeting that the defendants were to pay such sum. The defendants were not liable for the payment of such costs at that time. On what theory did they pay

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such sum, except on the condition that the actions were not to be further proceeded with? None other is apparent nor suggested. In the Yunck case a demurrer was interposed by the defendant and served on Mr. Voss, but never noticed for argument, nor ever argued. Mr. Rice, an attorney, asked Mr. Voss' consent to give him time to brief up certain law questions which he desired to raise in the cases, and Mr. Voss consented that the cases should be continued over the April term, and that Mr. Rice might serve answers or demurrers at any time before the April term. The actions were commenced early in January. Mr. Rice never served any answers or demurrers; hence the cases were in default of an answer in April. Judgment could have been applied for, and on producing evidence to the court of the maintenance of a nuisance by the unlawful sale or keeping for sale of intoxicating liquors by the defendants, the actions would have been decided in an orderly manner, either by the granting of a permanent injunction and a decree declaring the defendants guilty of maintaining a nuisance or by a dismissal of the actions for the want of evidence to warrant such a decree. It is proven in this record beyond question that some, if not all, of these defendants were engaged in openly running saloons where intoxicating liquors were sold by them. It cannot be entertained for a moment that evidence could not be produced to the court, under such circumstances, sufficient to warrant a decree in favor of the plaintiff. No attempt was made to do so. Undoubtedly there was a strong sentiment in Mandan against the enforcement of the prohibition law, but we lay no stress upon the contention made that efforts to enforce the law by actions such as these under consideration would be futile, as such contention is no less than an assertion that the citizens of Mandan and Morton county would perjure themselves rather than permit the enforcement of the prohibition law. Such a contention is not worthy of consideration or mention. Had Mr. Rice been permitted to serve answers, no different result would follow. The actions were equitable ones, and triable to the court, and it cannot be entertained that sufficient evidence could not have been procured. At all events, no efforts were made to do so, and we could not hold the defendant to be without culpable blame unless he had made a determined effort to do so and had failed. The evidence justifies the conclusion that the defendant did not force the prosecution of these actions to judgment, because he deferred to the action of the committee while in his office that the actions were to be dropped and not prosecuted. This was a violation of his duty as state's attorney, and, consequently, a violation of his duty as an attorney at law, and is highly reprehensible. The duties of state's attorney are to be performed regardless of public sentiment, and he who administers that office in deference to sentiment opposed to the law is unfit to hold that office or to be an attorney at law. It is not meant by us that state's attorneys are to furnish evidence of violations of the law, nor are they to act as detectives in order to further prosecutions. Such action is not, in our judgment, contemplated by the statute. But it

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is his duty to force arguments on law matters to a decision without being prompted, and if he knows of no evidence to warrant decrees in default cases the relator should be called on to produce the necessary proofs, and the state's attorney's failure to act in such cases is not excused on the ground that public sentiment is hostile to the enforcement of the law, or that convictions are difficult to obtain on account of such sentiment. This question was asked of Mr. Voss: "If there has been any act or neglect to act on your part which might be construed as a neglect to enforce either of these laws, was that act or neglect to act brought about by what appeared to you the exigency of the case, taking into consideration the general sentiment and feeling of the community?" He answered: "Yes, sir; I realized the fact through the years I have been public prosecutor that a penal statute does not rise above the sentiment back of it." The sentiment of the community respecting the enforcement of a law should not be the test as to whether it is to be enforced or not. State's attorneys are not permitted to thus practically repeal laws deemed obnoxious by their constituents. Their duty lies in the direction of attempting the enforcement of all laws when violations are properly brought to their attention. We do not understand that mere inaction by a state's attorney in enforcing the prohibition law, when he is not asked to take action on evidence produced to him, is a violation of his duties. But to virtually dismiss actions commenced in response to the wishes or arrangements of those opposed to the enforcement of that law is quite another question, and to so act when there is evidence in his possession to warrant an attempt to secure judgment is, in our judgment, acting under wrong motive, and in direct violation of the oath of office taken by him, and consequently a violation of his duties as an attorney at law. It is a palpable neglect to prosecute a violation of that law as directed by section 7604, Rev. Codes 1899, and is a misdemeanor under the provisions of section 7620, Rev. Codes 1899, under which he might have been removed from his office. It involved a violation of an express statute, and is a misdemeanor involving moral turpitude. In so holding we are following a prior decision of this court, although such decision was not upon facts entirely similar to the facts of this case. See In *re Simpson*, 9 N. D. 379, 83 N. W. Rep. 541. This instruction was given to a jury by the chief justice of the supreme court of Kansas in a proceeding before that court to remove a county attorney from office, viz.: "A county attorney cannot be controlled by the wish or sentiment of the people of his county in the prosecution of the violators of the law. A county is a political division of the state, and the county attorney, within his county, is a representative of the state. After he has commenced prosecutions under the prohibitory act against parties guilty of the violations of the provisions of that law and has been furnished with the names of witnesses by whom the violations can be proved, he is not to be deterred from his duty by mere public clamor." *State* v. *Foster*, 32 Kan. 41, 3 Pac. Rep. 537. In the same opinion it is said by that court: "After the utterance of this oath, he cannot sit down

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with folded hands and refuse to perform the duties imposed upon him solely upon the ground that the sentiment of the community or county in which he resides is in opposition to the enforcement of the criminal laws of the state. Such action on his part would tend to increase lawlessness. Under such doctrine, the more lawless the community, the less the criminal prosecutions." Again, in the charge on page 34, 32 Kan., the chief justice said: "No actual corruption or bribery need be established. If he was influenced to dismiss the case by a desire to shield and protect the persons against whom he had filed complaints from punishment for their acts, your verdict should be for the state."

The evidence disclosed that the defendant, while state's attorney, engaged in gambling in a public gambling house. He engaged in gambling for money on the roulette wheel, and engaged in playing craps for money. This the defendant admits, but insists that he did so on a few occasions only, and for small sums. If true, we do not deem that to be a defense of controlling importance. But there is evidence of several witnesses that he frequently engaged in such games, and for sums of money that some of them considered large, during the fall of 1898. The evidence does not show that he was a regular patron at the McDonald gambling place, but that he was there frequently during the fall of 1898 is not denied by him, and that he gambled there on several occasions during that time is proven. The prosecution insists that such conduct is ground for disbarment, under the provisions of section 433 of the Political Code, which provides that the license of an attorney at law may be revoked or suspended; "(1) When he has committed a felony or misdemeanor involving moral turpitude." Section 7243, c. 37, Rev. Codes 1899, pertaining to gaming, provides that: "It is the duty of all sheriffs, police officers, constables and prosecuting or state's attorneys to inform against and prosecute all persons whom they have credible reason to believe are offenders against the provisions of this chapter and any omission so to do is punishable by a fine not exceeding five hundred dollars." Neglecting to inform against the keeper of this gambling house under such section is made a misdemeanor. To inform against such keeper, when he had positive evidence of guilt, was the duty of the defendant, and his failure to do so was a plain violation of his official duty. Whether such misdemeanor committed by him was one involving moral turpitude remains to be considered.

Gambling is an act beyond the pale of good morals, and is an evil practice under any circumstances, though it does not necessarily involve moral turpitude. But the misconduct charged against the defendant is not that of gambling, but a failure to prosecute the keeper of such a place after having knowledge that he kept a place containing gambling devices. The charge is that he refrained from prosecuting, from corrupt motives, after having received money from such keeper as a consideration for his not being prosecuted. There is no evidence that he received money from such person with any such object. But that does not alter the situation nor justify his conduct.

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He did not inform against such person nor prosecute such person. His answer is that no one asked nor requested him to prosecute. The statute contemplates that he shall make a complaint himself. In this class of cases he must become informant and prosecutor when he has knowledge of guilt or credible reason to believe that such offense has been or is being committed. The section imposes an unusual duty upon state's attorneys—one requiring them, under penalties, to institute criminal proceedings in such cases. By accepting the office of state's attorney, this duty is assumed, as well as other and more agreeable duties. To violate such duty is a violation of and an utter disregard of his oath of office. The commission of a misdemeanor that necessarily, by its commission, includes a violation of an oath of office, is committing a misdemeanor that involves moral turpitude. Though not perjury in a technical sense, it still involves the violation of an oath, and there can be no wilful violation of an oath that does not carry with it a disregard of principle and law amounting to moral turpitude.

On June 14, 1895, one Louis Goeschel made a complaint against one William Churchill before Frank Wilder, Esq., a justice of the peace, charging said Churchill with threatening to do bodily harm to said Goeschel, and prayed that said Churchill be placed under bonds to keep the peace. Mr. Voss first appeared on behalf of the state. The warrant was issued by the justice without consultation with Mr. Voss. Upon coming into court Mr. Voss moved that the defendant be dismissed, upon the ground that he had made an investigation of the facts and found that the defendant had committed no offense and was justified in doing what he did. The justice refused to dismiss the case. Thereupon the complaining witness asked the court to be allowed to retain private counsel, as Mr. Voss was representing the defendant. Mr. Voss consented to this, and Mr. Shaw thereafter conducted the prosecution. Mr. Voss, however, remained in the case, and took some part in the examination. During the hearing, Mr. Voss seemed to direct all his efforts to show that the defendant was blameless and justifiable in what he did. He held consultations with the defendant during the hearing. The defendant had no attorney, and seemed to look to Mr. Voss for advice. Mr. Voss and the defendant stepped aside or away from the parties in the room, and held several consultations during the hearing. The justice testifies as to his conduct at the hearing: "I don't think he took any witness and went through a regular cross-examination or examination, but he would shy in a question now and then. I want to state that Mr. Voss claimed and said all the time that he did not take any sides in the case, but as a matter of fact, he was so prejudiced in favor of the defendant that he could not keep from shying in remarks and questions, and Mr. Voss started in with the idea that the matter ought to be dismissed at once, and the further he progressed he more earnest he became in that opinion, and finally lost all control of his temper, and proceeded along that line." The justice further testifies: "Of course, when he brought in those remarks and whisperings I

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called him down a little, and he then made the statement that he was not taking any sides in the case, but wanted to sift the matter to the bottom, but pretty soon he would be over in the position of the defendant's attorney." After one of the defendant's witnesses was sworn, Mr. Voss told him to go on and tell what he knew about the case. At the conclusion of the taking of testimony both Mr. Voss and Mr. Shaw addressed the court, Mr. Voss contending that the defendant should be discharged. The court placed the defendant under bonds to keep the peace. Upon this decision being announced, Mr. Voss "spoke quite sharply and vehemently," and denounced the decision of the justice as an "outrage." Afterwards Mr. Voss and the complaining witness had a bitter personal altercation in open court, highly discreditable to both, and highly contemptuous to the court.

It is impossible to read the evidence of the justice and other witnesses, including that of Mr. Voss, without being convinced that Mr. Voss went further than his official duty demanded, even if it be conceded that he conscientiously believed that the defendant should not have been placed under bonds. He showed the most intense prejudice in favor of the defendant and against the prosecution. If he in good faith believed, after thorough investigation, that the defendant was not guilty as charged, then it was his duty to move the dismissal of the case. But his duty ended with such motion, and he had no right to remain in the case thereafter for the purpose of assisting the defendant, directly or indirectly. His conduct is more open to criticism by reason of the fact that the defendant in that case was the hired man of and acting under instructions of one Barrows. Barrows and the complaining witness, Goeschel, were having a lawsuit over some property matters, and it was in reference to such property that Churchill and Goeschel had the trouble that culminated in Churchill's being placed under bonds to keep the peace. Mr. Voss was Barrows' attorney in this civil case. Goeschel and Mr. Voss were and are the bitterest of enemies. It further appears from the evidence that Mr. Voss had not in his investigations talked with Goeschel as to the origin of the trouble, nor as to his version as to the truth of the affair. At the origin of the trouble, no one was present save the two participants. Hence Mr. Voss' statement to the court in the motions, that he had thoroughly investigated the trouble, was not true. Everything connected with this hearing tends to show that Mr. Voss lent his assistance to the defendant and was opposed to a prosecution. He assisted the defendant when his duty was to assist the state. If he could not conscientiously, and consistently with his official and professional honor, assist the state, he should have left the court room after making his motion to dismiss, and not have remained there virtually in the interests of the defendant. The justice was not bound to grant Mr. Voss' motion to dismiss the case. Perhaps it might be good practice to do so in ordinary cases, but he need not do so as a matter of right. In *People* v. *Ward*, 85 Cal. 585, 24 Pac. Rep. 785, it is said in the syllabus: "A justice of the peace has power to determine whether or not a criminal action brought before him shall be

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dismissed, and is not bound to obey the order of the district attorney for such dismissal." His conduct in reference to this case throughout was censurable, and tended to bring courts of justice into disrepute. The statute enjoins upon attorneys the duty of maintaining the respect due to courts of justice, and makes a wilful violation of such duty ground for disbarment. Throughout this hearing he went beyond the bounds of propriety as enjoined by the statute and professional ethics, and flagrantly violated both. In *People* v. *Spencer,* 61 Cal. 130, it is said: "But, independent of the statute, there can be no doubt that his conduct was reprehensible. By appearing both for plaintiff and defendant in the same action, he was guilty of 'a violation of his duty as an attorney,' for which it is our duty to remove or suspend him. Code Civ. Proc. § 287. Neither his ignorance of the laws, nor the crudity of his notions of professional ethics, can excuse an offense against professional propriety by one whose duty it is to assist in the administration of justice. The degree of turpitude involved in the breach of his duty by an attorney, however, must appear in the circumstances of each case. * * * However innocent his motives, his conduct must be condemned."

After the defendant in that case was bound over to keep the peace, he and Goeschel had another encounter, in which each used firearms, in an endeavor to kill or disable the other by shooting at each other. One shot resulted in one of the participants being wounded, but not very seriously, although several shots were fired. Mr. Voss caused the arrest of both, and both were bound over to the district court on some minor charge. The cases yet remain undetermined. It is claimed by the prosecution that Mr. Voss was derelict in his duties in not bringing an action on the bond given by Mr. Churchill to keep the peace a few weeks before this last-mentioned encounter. We shall not attempt to determine which person was the aggressor on this last occasion. The record is full of incompetent and hearsay evidence that should be stricken out and not considered. For instance, one Barry, a witness to a part of the affray, is now dead. Still, his version of the case is on the record. Mr. Churchill has left the jurisdiction, and his whereabouts are unknown. Still, his version of the trouble, as told by him to one witness, is spread upon the record. These things are mentioned to show why we are unable to determine who was at fault as respects the last trouble between the parties. Mr. Voss says that he investigated the case thoroughly, and deemed it his duty not to forfeit Churchill's bond and bring an action thereon. We have no reason to dispute this statement, and do not do so. We remark, however, that this last-mentioned trouble should not have been allowed to go unprosecuted. One of the participants was to blame and should have been punished. Each of these three derelictions of duty pertain to Mr. Voss' actions as state's attorney.

No charges have been preferred, nor does the evidence disclose any personal misconduct, except his acts of gambling; nor is any charge preferred, nor does the evidence show any misconduct in his professional experience as an attorney at law. It is gratifying that

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we are able to say this. But his course as a state's attorney, in the matters herein set forth, cannot be allowed to pass without condemnation. He held the office of state's attorney by virtue of his having a license from this court to practice law, and any deviation from the line of proper deportment in the office of state's attorney is equally a deviation from the line of proper deportment as an attorney at law. It cannot be successfully maintained that criminal conduct on his part as state's attorney cannot be used as evidence to take from him the authority under which he practices law, and under which he exercises the functions of state's attorney, whereas a person may commit some offenses not connected with his duties as an attorney at law, when such offenses do not unfit him for the practice of his profession and render him unworthy of the confidence of clients, and no ground exists for disbarring him. In such cases the man and the attorney at law are deemed separate, and an act that may reflect seriously upon the character of the man will not be grounds for disbarment or suspension. But it is not true that corrupt conduct on the part of a state's attorney in his professional capacity will not constitute cause for disbarment or suspension as an attorney and counselor at law. Our conclusion is that the misconduct shown would justify disbarment. But in view of the circumstances and the fact that the attorney in charge of the prosecution does not ask for a disbarment, and in view of the fact that the ends of justice will in our opinion be subserved by a more lenient judgment than that of disbarment, we will not inflict the severest penalty.

In view of the evidence we conclude that the defendant should be temporarily suspended from practicing as an attorney and counselor at law in all the courts of this case. The judgment of the court is that the defendant be suspended from the practice of law in all the courts of this state for the period of nine months from the 23rd day of April, 1902, and that he be reinstated at the end of such period without further action on the part of this court, unless, prior to the expiration of such period, a written statement shall be filed with the clerk of this court, signed by a majority of the prosecuting committee of the State Bar Association, setting forth that the defendant has been guilty of misconduct showing that he is not worthy nor enitled to be reinstated, or has violated the mandate of this court herein, during the period of his suspension. All concur.

(90 N.W. Rep. 15)

SAMUEL ELDRIDGE *vs.* JOSEPH E. KNIGHT.

Appeal from Justice—Notice—Bond.

In appealing from the justice court to the district court, it is sufficient that a proper notice of appeal is served upon the adverse party or his attorney, together with an undertaking executed on the part of the appellant by sufficient surety, conditioned as required by section 6772, Rev. Codes, and that such notice of appeal and undertaking

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with proof of service thereof, be subsequently, and within 30 days after the rendition of the judgment appealed from, filed in the office of the clerk of the district court to which the appeal is taken, and that the undertaking on appeal be approved by the clerk of such district court before the filing thereof.

Filing Bond—Service—Approval.

It is not necessary, under sections 6771, 6772, 6776, and 6777, Rev. Codes, regulating appeals from justice court, that the undertaking on appeal be approved and filed by the clerk of the district court before the same is served upon the appellee, or that proof of the approval of the undertaking by the clerk be served.

Appeal from district court, Barnes county; *Glaspell,* J.

Action by Samuel Eldridge against Joseph E. Knight to recover possession of personal property. Plaintiff recovered judgment in justice court for the possession of the property and for his costs. Defendant appealed from this judgment in proper time to the district court upon questions of both law and fact. The notice and undertaking for appeal were in proper form, and were served upon plaintiff's attorneys, and service thereof admitted by them in writing. Thereafter, and on the same day, the undertaking for appeal was approved by the clerk of the district court of Barnes county, to which the appeal was taken, and he indorsed his approval thereon over his official signature, as follows: "I approve within undertaking and surety thereon." The notice of appeal and undertaking so approved, with proof of their service upon plaintiff's attorneys, were then filed by said clerk in his office. The case was on the trial calendar of the district court of the June, 1902, term, whereupon, on motion of the respondent, the appeal was dismissed with costs, against the appellant, Knight, for the reason, as recited in the order and judgment, that the alleged undertaking on appeal was not approved by the clerk of the district court of Barnes county, nor filed in his office, before the same was served on the respondent, and that no notice of the approval of such appeal bond was ever served on the respondent. Reversed.

W. J. Courtney (*Morrill & Engerud,* of counsel) for appellant.

Zuger & Paulson, for respondent.

COCHRANE, J. The sole question raised by this appeal is whether the undertaking upon appeal from the justice to the district court must be approved by the clerk of the district court to which the appeal is taken before the same is served upon the adverse party or his attorney. It is claimed that the security contract does not become an undertaking, within the meaning of the statute, until it has been approved by the clerk of the district court, and filed; and that proof of its approval and filing should be served with the undertaking, that service of an approved undertaking is jurisdictional. Therefore, in this case, the undertaking on appeal having been served upon appellee before, and not after, its approval, that the statute was not complied with, and the district court did not acquire jurisdiction of

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the case. This contention is based entirely upon the phraseology of the appeal statute. "The appeal is taken by serving the notice of of appeal on the adverse party or his attorney and by filing the notice of appeal together with the undertaking required by law with the clerk of the district court of the county to which the appeal is taken." Section 6771, Rev. Codes. "To render an appeal effectual for any purpose an undertaking must be executed on the part of the appellant by sufficient surety, * * * which undertaking shall be approved by and filed in the office of the clerk of the district court of the county to which the appeal is taken." Section 6772, Id. "The undertaking for appeal must be served with the notice." Section 6776, Id.; it is provided by section 6775, Rev. Codes, that the appellant, in lieu of an undertaking, may deposit with the clerk of the district court in whose office the notice of appeal is required to be filed a sum of money equal to the amount for which such undertaking is required, and notice of the making of such deposit may be given with the notice of appeal. "Upon the filing of the notice of appeal and undertaking, or the making of the deposit prescribed in section 6775 in the office of the clerk of the district court, such clerk shall immediately mail to the justice of the court in which the judgment appealed from was rendered a written notice thereof, specifying the court in which the judgment was rendered, the names of the parties, the date and amount of the judgment appealed from and stating whether the undertaking filed or deposit made entitles the appellant to a stay of execution and requiring such justice to transmit to such clerk the record required by law." Section 6777, Id. The statute makes the service, approval, and filing of the undertaking prerequisite to the transfer of jurisdiction from one court to the other. The service without approval, or the approval without filing, or both the filing and approval without service, will not answer. The order of performance of the separate steps necessary to be taken in accomplishing the transfer is the order in which they are named. The first step is the service of the notice of appeal and undertaking upon the adverse party or his attorney, and the last one necessary to the transfer of jurisdiction is the filing of the notice of appeal and undertaking in the clerk's office. Section 6771, quoted above, is unambiguous, and does not require interpretation. The service of the notice of appeal should precede its filing, because this is the order of performance indicated by its language, and the undertaking for appeal must be served with the notice. Section 6770; *Richardson* v. *Campbell*, 9 N. D. 100, 81 N. W. Rep. 31. Thus, in Nevada, California, and Montana, the statute for appeal in civil cases provided that "an appeal should be made by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, and by serving a copy of the notice upon the adverse party or his attorney." Under this statute it was held that the filing of the notice of appeal must precede or be contemporaneous with the service of the copy on the adverse party. *Buffendeau* v. *Edmondson*, 24 Cal. 95; *Lyon Co.* v. *Washoe Co.*, 8 Nev. 177; *Courtright* v. *Berkins*,

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2 Mont. 404. When the undertaking is presented to the clerk of the district court for approval, and to be filed with the notice of appeal in his office, proof of the service of the notice and undertaking should also be produced and filed. *Eaton* v. *Supervisors,* 42 Wis. 318. The clerk has a judicial function to perform. Before approving the undertaking for appeal he must determine whether it is a mere appeal undertaking, or whether it is, in form and otherwise, sufficient to accomplish both the transfer of the case and a stay of proceedings in the court below. He must determine, in a tentative way, from proofs presented to and filed with him, whether the notice of appeal and undertaking have been served upon the adverse party, and within 30 days after the rendition of the judgment from which the appeal is being taken; and at least *prima facie* evidence of such service should accompany the papers presented for filing, not only to show his right to file the same, but to enable him truthfully to give the required notice to the justice of the peace under section 6777, Rev. Codes.

The jurisdiction of the district court attaches immediately upon the filing of the notice of appeal and undertaking in the clerk's office. No time can intervene between the time of severing of jurisdiction of the justice and the attaching of the jurisdiction of the court to which the appeal is taken. This is manifest from the reading of section 6777. Immediately upon the filing of the notice of appeal and undertaking the clerk is required to mail to the justice of the court in which the judgment appealed from was rendered a written notice thereof, specifying the court in which the judgment was rendered, the names of the parties, the date and amount of the judgment appealed from, and stating whether the undertaking filed entitles the appellant to a stay of execution, and requiring such justice to transto such clerk the record required by law. The word "immediately," as used in this section, means "without interval of time," "without delay." No time is given after the filing of the papers in the clerk's office within which they may be removed for service. On the contrary, service must precede filing, and proof of it must be made as a preliminary to and foundation for the filing of the notice and undertaking of appeal. The clerk of the district court cannot notify the justice from whom the appeal was taken to send up the record until the district court has acquired jurisdiction of the case. Therefore all acts necessary to transfer jurisdiction must be performed before the one which must be immediately followed by the notice to send up the record. The statute which requires that the undertaking shall be approved and filed is equally imperative as to both the approval and filing. If, therefore, the filing of the undertaking must follow its service, the approval may also follow its service. Consequently, the undertaking may be served before it is either approved or filed. But the contract of indemnity is an undertaking before approval and before filing, sufficient to bind the surety when it is subsequently filed and approved. When the surety signs and delivers the undertaking with

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intent to have it delivered and accepted, it does not lie in his mouth to repudiate the liability thereby incurred, providing the further acts necessary to perfect an appeal in the given case follow in sequence, and without delay. *State* v. *Pepper,* 31 Ind. 76; *Wright* v. *Harris,* 31 Iowa, 272; *Webb* v. *Baird,* 27 Ind. 368, 89 Am. Dec. 507. If, in the case at bar, the surety on the undertaking could, in hostility to the right of appellee, have changed his relation to the appellee within the time consumed in perfecting the approval and filing of the undertaking after it had been served upon the appellee, he certainly did not do so. The undertaking was approved and filed, and, as to the appellant and the surety, became a binding undertaking.

The requirement of an undertaking for appeal is not wholly for the benefit of appellees, but a public policy in discouragement of frivolous and vexatious litigation enters into such enactments. *Brown* v. *Ry. Co.,* 10 S. D. 635, 75 N. W. Rep. 198, 66 Am. St. Rep. 730; *Rudolph* v. *Herman,* 2 S. D. 399, 50 N. W. Rep. 833; *Santom* v. *Ballard,* 133 Mass. 464. Nevertheless, the obligor or his surety cannot take advantage of nonapproval to escape liability after a breach of condition. *Prescott* v. *Bacon,* 64 Iowa, 702, 21 N. W. Rep. 151; *Whitehurst* v. *Hickey,* 15 Am. Dec. 170; *Mendocino Co.* v. *Morris,* 32 Cal. 145; *People* v. *Edwards,* 9 Cal. 286. The appeal is ineffectual for any purpose unless the undertaking has been approved and filed, but the statute does not say that, to render the appeal effectual, the undertaking shall be approved and filed before it is served. In this case the notice and undertaking were served together within proper time; the undertaking was approved by the clerk and filed in his office with the notice of appeal; the statute was literally complied with. The undertaking was legally delivered, and the surety thereon, from anything appearing in this record to the contrary, would be holden for the costs adjudged on dismissal of the appeal by the district court, if that judgment were permitted to stand. Section 5582, Rev. Codes; In *re Weber,* 4 N. D. 119, 59 N. W. Rep. 523, 28 L. R. A. 621; *Prescott* v. *Bacon,* 64 Iowa, 702, 21 N. W. Rep. 151. Our conclusion is that the court erred in dismissing the appeal from justice court.

The judgment of the district court is reversed, and that court is directed to reinstate said appeal the same as if its judgment of dismissal had never been made. All the judges concurring.

(93 N. W. Rep. 860)

ISAAC P. CLAPP *vs.* CHARLEMANGE TOWER, JR., *et al.*

Equitable Conversion—Contract for Sale of Realty—Death of Vendor.

A contract for the sale of real estate, which is valid and enforceable in equity, operates as a conversion. The vendor's interest thereafter in equity is in the unpaid purchase price, and is treated as personalty; the vendee's interest is in the land, and is realty. Upon the

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death of the vendor his interest passes to his executors as personalty, and continues as such for the purposes of administration; and, where such executors have canceled the contract of sale for default of the purchaser, and thus regained title, they may sell and convey such real estate, and account to the court of their appointment for the proceeds as personalty, and the title so conveyed is good as against the heirs of the decedent claiming title by succession.

Appeal from District court, Cass county; *Charles A. Pollock,* J.

Action by Isaac P. Clapp against Charlemange Tower, Jr., and others. Demurrer to answer sustained, and defendants appeal. Affirmed.

Robert M. Pollock, for appellants.

William J. Clapp, for respondent.

YOUNG, J. This is an action to quiet title to a section of land situate in Cass county, which was conveyed to the plaintiff by the executors of the last will and testament of Charlemange Tower, deceased. The complaint alleges that the plaintiff is the owner of said real estate, and that the defendants claim an interest therein adverse to the plaintiff, and prays that they be required to set forth their claims, to the end that their validity may be determined, and that title be quieted in the plaintiff. Defendants, in their answer, allege that they are the next of kin and all of the heirs at law of said Charlemange Tower, deceased, and all the surviving legatees under his will; that said Charlemange Tower died in, and a resident of, the city of Philadelphia, Pa., and that his will was probated there; that the land in question was sold by said deceased to one Hadley upon a contract which provided for the execution and delivery of a deed to him upon the making of certain deferred payments specified in said contract; that subsequent to the death of Charlemange Tower the executors of his will foreclosed said contract by reason of the default of said Hadley in making payments according to its terms, and that said land became a part of the estate of said deceased; that thereafter the executors, acting upon the theory that said land was subject to the principle and rule of equitable conversion, and was for the purposes of administration to be treated as personal property, sold and conveyed the same to the plaintiff, who has ever since been in possession of the same, claiming the ownership and possession thereof by virtue of said deed from said executors; that the defendants are the owners of said real estate by virtue of their heirship, and ask that the title be quieted in them. The plaintiff demurred to the answer upon the ground that it does not state facts sufficient to constitute a defense or counterclaim. The trial court sustained the demurrer, and the defendants appeal from the order sustaining the same.

The will of Charlemange Tower was before this court in the case of *Penfield* v. *Tower,* 1 N. D. 216, 46 N. W. Rep. 413. This court held that, so far as its provisions related to real estate situated in this state, it was inoperative and void, and that the real estate of said deceased in this state must be distributed according to the

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law of succession of this state, and that the personal property should be distributed according to the terms of the will. The only question involved upon the issue raised by the demurrer is whether the land in question should, under the facts pleaded in the answer, be treated as real estate or as personal property. If, for the purposes of administration, it retains the character of real estate, the will not being operative, it descended directly to the heirs, the defendants in this action. This is conceded. If, on the other hand, it is to be considered as personal property, it then went to the executors for the purposes of distribution, and they had full right and authority to sell and convey the same in the manner and form pursued, and to account for the proceeds to the orphans' court of the state of Pennsylvania, from which they received their appointment. It is very properly conceded by both parties that under the rule and doctrine of equitable conversion land may be treated as money and money as land, whenever, in equity, it is proper to invoke and apply the principle of that doctrine. "Equitable conversion is defined as a constructive alteration in the nature of property by which, in equity real estate is regarded as personalty or personal estate as realty." 7 Amer. & Eng. Enc. of Law (2d Ed.) p. 464. And the doctrine has its origin in the maxim of equity that that is regarded as done which should be done. *Penfield* v. *Tower, supra.* There is no room for doubt that upon the facts pleaded in the defendants' answer the rule of equitable conversion is applicable, and that the execution and delivery of the contract of sale of the real estate in question by Charlemange Tower during his lifetime—and the same was valid and enforceable at the time of his death—worked a conversion of the land into personalty. His interest, after the execution of the contract and at the time of his death, was the money contracted to be paid by the purchaser, and the purchaser's interest was the land contracted to be conveyed. In such cases, says Pomeroy, in his work on Equity Jurisprudence (section 105), "the vendor still holds the legal title, but only as a trustee, and he in turn acquires an equitable ownership of the purchase money. His property, as viewed by equity, is no longer real estate, in the land, but personal estate, in the price; and if he dies before payment, it goes to his administrators, and not to his heirs. In short, equity regards the contracting parties as having changed positions, and the original estate of each as having been 'converted'—that of the vendee from personal into real property, and that of the vendor from real into personal property." The doctrine is laid down in *Williams et al.* v. *Haddock*, 145 N. Y. 144, 39 N. E. Rep. 825, as follows: "Courts of equity regard that as done which ought to be done. They look at the substance of things, and not at the mere form of agreements, to which they give the precise effect which the parties intended. It is presumed that the vendor, in agreeing to sell his land, intends that his property shall assume the character of the property in which it is to be converted, and it cannot be denied that it is competent for the owner of land thus to make such land into money at his sole will and plea-

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sure. If the vendor die prior to the completion of the bargain, provided there has been no default, the heir of the vendor may be compelled to convey, and the proceeds of the land will go to the executors as personal property." The rule is uniform, we think, that, where a valid and binding contract of sale of land has been entered into, such as a court of equity will specifically enforce against an unwilling purchaser, the contract operates as a conversion. *Keep et al.* v. *Miller*, 42 N. J. Eq. 100, 6 Atl. Rep. 495. See, also, 7 Am. & Eng. Enc. of Law (2 Ed.) 471, cases cited in note 1. The only authority cited by appellants in opposition to this general rule which can be said to be at all in point is *Kerr* v. *Day*, 14 Pa. 112, 53 Am. Dec. 526. That case, however, cannot be considered as an authority in their favor, for in that case the contract of sale was not enforceable, and for that reason it was held that a conversion was prevented. Had the contract been valid and enforceable, as the contract in the case at bar, it is evident that the decision would have been otherwise.

The real estate in question, having assumed the character of personalty went to the executors, and it continued as personalty for the purposes of administration, so that the executors could, after the cancellation of the contract, sell and convey the same to the plaintiff in the manner and form pursued.

The demurrer to the answer was, therefore, properly sustained, and the order will be affirmed.

MORGAN, J., concurs.

COCHRANE, J., did not hear the argument or participate in the decision.

(93 N.W. Rep. 862)

WILLIAM ELY *vs.* JOHN ROSHOLT.

Live Stock—Liability of Owner.

The rule by statute in this jurisdiction, like that at common law, from which it is taken, declares the owner of live stock liable in damages for trespasses by such stock on the lands of another.

Damages—Proof.

When live stock, except hogs, while at large between the 1st day of November and the 1st day of April, range upon the uninclosed lands of another and injure personal property thereon, the owner of such stock, or the person in charge and possession thereof, is not liable for such damage, in the absence of proof of willful injury.

Live Stock may Roam at Large—When.

Construing together sections 1549 and 6153, Rev. Codes, horses, cattle, and other live stock are permitted to run at large between November 1st and April 1st each year, and are not permitted to run at large during the other months, except in those counties where, at an election called for the purpose, under sections 1550, 1551, Rev. Codes, the provisions of chapter 42 of the Code of Civil Procedure have been abolished.

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Lack of Ordinary Care Defeats Recovery.

A party cannot recover for damage to property caused by his own lack of ordinary care for its preservation.

Constitutionality of Statute—Not to be Questioned by one Unaffected.

One whose rights are unaffected by a statute cannot be heard to question its constitutionality.

Appeal from district court, Traill county; *Pollock*, J.

Action by William Ely against John Rosholt. Judgment for plaintiff, and defendant appeals. Reversed.

This case was tried in justice court, and appealed to the district court of Traill county, and was there submitted upon an agreed statement of facts, from which it appears that the provisions of chapter 42 of the Code of Civil Procedure have never been abolished in Traill county; that plaintiff was in the month of February, 1901, the owner and in possession of a section of land near Mayville, in Traill county, on which was a stack of hay belonging to plaintiff. The farm and hay stack were unfenced. Between February 20 and February 25, 1901, horses belonging to defendant repeatedly entered upon plaintiff's land, and devoured and destroyed $20 worth of hay in a stack. The defendant permitted his horses to run at large, but had no actual knowledge that they were destroying plaintiff's hay, and he had no intention of causing such damage. Before suing, plaintiff notified defendant in writing of his damage, and the probable amount thereof. The district court, as a conclusion of law, found "that the plaintiff is entitled to recover of defendant the value of the hay destroyed by defendant's horses, and is entitled to judgment herein for the value thereof, to wit, the sum of twenty dollars, and interest thereon since February 25, 1901, together with his costs in district court, taxed at fifteen and 65-100 dollars, and costs in this court to be taxed by the clerk." This conclusion of law is challenged by the appeal.

F. W. Ames, for appellant.

Asa J. Styles, for respondent.

COCHRANE, J. (after stating the facts). In this state the rule of the common law is declared by statute: That the owner of stock is liable in damages for trespasses by them (section 6153, Rev. Codes; *Bostwick* v. *Railway Co.*, 2 N. D. 440, 447, 51 N. W. Rep. 781) unless the trespass is committed between the 1st day of November and the 1st day of April (section 1549, Rev. Codes), and excepting in those counties where, by a majority vote of the electors, had pursuant to the provisions of sections 1550-1552, Rev. Codes, the operation of the earlier statute has been annulled. The destruction of respondent's property, complained of in this case, was accomplished in the month of February, when horses were permitted to run at large. The damage was not effected through any wilful act of the appellant. It is clearly the purpose of the law to require the owner or person in

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charge or possession of horses, mules, cattle, goats, sheep, and like animals, to restrain them from running at large except during the months of winter, between November 1st, and April 1st, when the annual crops have been gathered, and when, under ordinary conditions, as they here exist, emblements and accretions of the soil have been housed, marketed, or stacked within inclosures sufficient to turn stock, and that during these winter months the advantages to the stock owners of being permitted to let their stock run at large overbalance the disadvantages to a minor part of the community in being required to protect haystacks against ranging horses, mules, cattle, and sheep. As to this class of legislation other states have been controlled by the same consideration, viz., the requirements of local conditions. Note to *Bulpit* v. *Mathews* (Ill.) 22 L. R. A. 55 (s. c. 34 N. E. Rep. 525); *Buford* v. *Houtz*, 10 Sup. Ct. 305, 33 L. Ed. 618; *Kerwhaker* v. *Ry. Co.*, 3 Ohio St. 179, 62 Am. Dec. 246; *Seeley* v. *Peters*, 5 Gilman, 142; *Morris* v. *Fraker*, 5 Colo. 425; 12 Am. & Eng. Enc. L. 1042, and note. It is equally clear that, if live stock is permitted to run at large during any portion of the year, an action is not maintainable by landowners for injury to their personal property thereon by ranging stock at such times when the ordinary precautions which common prudence would dictate have not been taken to protect such property from destruction. Applying the rule of law to the facts of this case, respondent's negligence in leaving his hay out upon an uninclosed field, and without any stock guard around the stack, during a season of the year when stock was permitted to run at large, was the direct cause of his loss. *Jones* v. *Witherspoon*, 78 Am. Dec. 263; *Chase* v. *Chase*, 15 Nev. 259.

Counsel for respondent contends that the concluding proviso in section 6153, Rev. Codes, viz., "None of the provisions of this chapter shall be construed as conflicting with the provisions of section 1549 of the Political Code, permitting stock to run at large from the first day of November until the first day of April of each year," was not intended to except from the operation of the statute the five winter months, and render the statute operative but seven months in the year, but that the proviso furnishes a rule of interpretation only; that but for this proviso the later statute would conflict with, and therefore operate as a repeal of, the earlier enactment, permitting stock to run at large during the winter months; that permission for stock to run at large from November 1st to April 1st does not relieve the stock owner, during these months, from the liability imposed by section 6153, Rev. Codes, but that the party injured can recover for damages done his property between November 1st and April 1st by by stock running at large, the same as during other months of the year, and regardless of the consideration whether the property was fenced or unfenced. This was the view of the trial court. This construction is opposed to the theory underlying this class of legislation. When the legislative department of the state declared that domestic

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animals of the kind enumerated in the statute might run at large during winter months, it relieved the owner of such animals from any imputation of negligence in not restraining such stock within an inclosure during these months; and such owner does no wrong by allowing them to go unconfined, and is not responsible to his neighbor for their acts, if, for want of proper precautions and care in housing or fencing his perishable property, the neighbor's property is injured by such animals so permitted to be at large. The encroachment of such animals upon another's land during these months is not such a trepass as will sustain an action for damages. *Davis* v *Davis*, 70 Tex. 123, 7 S. W. Rep. 826; *Clarendon L. I. & A. Co.* v. *McClelland Bros.* (Tex. Sup.) 23 S. W. Rep. 576, 1100, 22 L. R. A. 105, 108; *Poindexter* v. *May* (Va.) 34 S. E. Rep. 971, 47 L. R. A. 588; *Baylor* v. *Ry. Co.*, 9 W. Va. 270. The proviso in section 6153 cannot be effective, and section 1549 cannot be operative, and animals permitted to run at large during the winter months, if hay and grain can be left exposed in the open, without guard or protection, to attract animals and create litigation. The owner of annual crops must take notice of the law, and adopt reasonable precautions to guard from destruction such perishable property while stock is at large. "The general law imposes on the landowner no obligation to fence, but when land is left uninclosed the owner takes the risk of trespass thereon by the animals of others running at large, and can maintain no action for such trespass." *Poindexter* v. *May* (Va.) 34 S. E. Rep. 971, 47 L. R. A. 590. If the operation of this statute results to the detriment of farmers in the thickly populated counties of the state, their redress is in a repeal of section 1549, Rev. Codes.

Under sections 1550-1565, Rev. Codes, the inhabitants of any county may, at an election called on petition for such purpose, abolish the statute in the particular county so that cattle and live sock, excep hogs, may run at large therein at all seasons of the year. In counties where stock is so permitted to range, the owners of cultivated land must fence, and may recover against the owner or person in charge of animals for injuries done by reason of such animals breaking or breaching a close, and for destruction of property therein. Section 1555, Rev. Codes. This construction in no way conflicts, but, on the contrary, is in accord, with the provision in section 1571, Rev. Codes, prohibiting the taking up of estrays between November 1st and March 31st, unless found trespassing upon the premises or within the inclosure of the person taking up the same, because the entry of stock on uninclosed lands during these months is not a trespass. The statute allowing animals to run at large in counties voting in favor thereof is not special or local, but general, in its application. The constitutional questions raised by respondent are not considered and decided, for the reason that he is not in a position to raise the question. *State* v. *McNulty*, 7 N. D. 169, 73 N. W. Rep. 87; *State* v. *Donovan*, 10 N. D. 203, 86 N. W. Rep. 709; *Turnquist* v. *Cass County*, 11 N. D. 514, 92 N. W. Rep. 852; *State* v. *Becker*, 3 S. D. 29, 51 N. W. Rep. 1018.

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The judgment of the district court is reversed. The record will be remanded, with directions to that court to reverse its judgment, and enter judgment for appellant, dismissing the action, and for his costs in the justice's and district court. Appellant will recover costs of this appeal.

(93 N. W. Rep. 864)

FRANK N. FORMAN *vs.* SIMON P. HEALEY, *et al.*

Injunction—Defendant not Entitled to.

A defendant in a civil action is not entitled to the provisional remedy by injunction. This remedy is entirely a creature of statute, and is awarded only to the plaintiff in a proper action.

Order without Legal Justification.

Even if the defendant in a civil action be considered, for the purposes of his counterclaim, as entitled to the remedies given a plaintiff under section 5344, Rev. Codes, and treating the counterclaim as a complaint, the defendant in his pleading alleges no facts entitling him to injunctive relief, and his demand is for a money judgment only. His moving papers impute to the adverse party no act which, if done pending the action, would tend to render his judgment ineffectual; hence the order appealed from is without legal justification.

Complaint Must State Facts Entitling Plaintiff to Injunctive Relief.

To entitle a plaintiff to an injunction restraining the defendant pendente lite, it must appear from the facts stated in the complaint that plaintiff is entitled to injunctive relief, and it must be demanded in the prayer for relief; and this is true when the injunctional order is applied for on affidavits after issue joined, under subdivisions 2, 3, § 5344, Rev. Codes, showing that defendant threatens or is about to do an act which would tend to render the judgment ineffectual.

Possession of Land—Order Ejecting Plaintiff—Contempt.

In an action brought to determine the right to possession, use, and occupation of land, an interlocutory order, secured on affidavit, ejecting plaintiff from the land, and restraining his re-entry, is void, as without legal authority, and as determining the merits before trial. Disobedience of such an order cannot be punished as for contempt.

Appeal from district court, Richland county; *W. S. Lauder, J.*

Action by Frank N. Forman against Simon P. Healey and another. Plaintiff secured a temporary injunction to prevent threatened waste. Defendants subsequently, *pendente lite,* secured an order setting aside the injunctional order of plaintiff, directing the vacation of the disputed tract by plaintiff, and enjoining plaintiff from interfering with or obstructing defendants' use and occupation of the land. From this order the plaintiff appealed. Reversed.

The parties to this controversy are severally located upon a quarter section of government land in Richland county, N. D.; each claiming

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residence and right to perfect title under the homestead laws of the United States. The plaintiff, in his complaint, avers that he established residence upon the land, and received from the United States land officers a certificate of homestead entry, on the 27th day of April, 1899, and that at the time of the commencement of his action he occupied the land, with his family, as a homestead; that the defendant, in July, 1899, entered upon the premises, and cut and was about to remove therefrom the crop of grass and hay, against the will and without the consent of plaintiff, to plaintiff's damage $50; that the defendant was insolvent, and that he would enter upon the land and commit waste unless restrained. Plaintiff demanded judgment for $100 damages, and for an injunction perpetually restraining the defendant from entering on the premises for the purpose of committing waste, or cutting or carrying away the grass and hay growing thereon. The defendant Healey's answer to the complaint consisted of denials, and by way of counterclaim he averred his actual possession of the land in dispute for the purpose of settlement and residence under the homestead laws; that his possession had been continuous for three years prior to said time; that 10 acres of the land were broken and cropped by him to grain and garden vegetables, and that for three years prior to the commencement of the action he had cut and removed the hay therefrom; that he was an applicant for a homestead filing upon said land, and that his right to make such filing was in contest before the Interior Department of the United States; that said contest was pending and undisposed of; that because of a restraining order issued in the action, preventing his occupying a portion of said land, and cutting the hay, grain, and vegetables thereon, he was damaged in the sum of $300, wherefore he demanded judgment for $300 and costs. The averments of the defendant's counterclaim are denied by reply on the part of the plaintiff. No facts are alleged in the counterclaim of defendant entitling him to equitable relief; nor is there any prayer for equitable relief, by way of injunction, or otherwise, in his answer. An order to show cause, supported by affidavits on the part of the plaintiff, and opposed by affidavits on the part of the defendant, was brought on for hearing before the judge of the district court on the 13th day of July, 1899, and resulted in the issuance and service upon the defendant of an injunctional order enjoining and restraining defendant from entering upon the east half of the quarter section of land in dispute for the purpose of committing waste, cutting and removing grass thereon, or in any way interfering with the plaintiff's use and occupation thereof. But defendant Healey was allowed the use and occupation of 10 square acres of said land, whereon his house was situated, pending the determination of a hearing before the United States land office at Fargo. The 10 acres are described in the order. The injunctional order was continued until the month of April, 1901, when the defendant Healey, upon affidavit, secured the issuance and service of an order to show cause why the same should not be vacated and set aside, and the plaintiff, in turn, restrained from sowing the land to crops for the

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crop season of 1901. The plaintiff appeared and opposed said order by affidavit, and after hearing, and on the 21st day of May, 1901, the court issued an injunctional order vacating the injunctional order of July 13, 1899, and restraining the plaintiff, his agents and servants, from interfering with the use and occupation by the defendant Healey of the land in dispute, excepting a strip upon which plaintiff's dwelling house is situated, and which was described by metes and bounds in said order. No appeal was taken from this order, and the same was continued until the 24th day of April, 1902, when, upon an order to show cause obtained in said action by the defendant upon affidavit, the injunctional order from which this appeal is taken was made, entered, and served upon the plaintiff, Forman, wherein it is recited that: "The plaintiff having failed to show just cause why the injunctional order issued in this action on the 21st day of May, 1901, should not be vacated and set aside, or why the said plaintiff should not be directed and commanded to yield and surrender up to the defendant Simon P. Healey the possession of the east half (E. ½) of the southeast quarter (S. E. ¼) of section thirty-five (35) in township one hundred thirty-three (133) north, of range forty-eight (48) west, and why said plaintiff, and his agents, servants, and employes, should not be permanently enjoined from in any manner interfering with the possession and use of said land, and the whole thereof, by said Simon P. Healey; it appearing to the satisfaction of the court, from the affidavits of Charles E. Wolfe, Simon P. Healey, R. N. Ink, Harry B. Quick, and S. B. Pinney, filed herein, and from the records and files in this action, that the defendant Simon P. Healey is now entitled to the exclusive possession of said tract of land, and to its use and occupation, and that the plaintiff, Frank N. Forman, has no right, title to, nor interest in said land, or any right to the possession of the same, or any part thereof, but, on the contrary, is in the unlawful occupation and possession of a part of said lands, and refuses to surrender the same to said Simon P. Healey: Now, therefore, it is ordered that that certain injunctional order dated the 21st day of May, 1901, be, and the same is hereby, vacated, set aside, and annulled in all things. And it is further ordered that you, Frank N. Forman, the plaintiff, and your agents, servants, and employes be, and you are hereby, perpetually enjoined and restrained from in any manner interfering with or hindering or obstructing the use and occupation of said lands, and every part thereof, by the defendant Simon P. Healey. And it is further ordered that you, immediately after the service of this order upon you, vacate said premises, and surrender and yield up possession thereof, and every part thereof, to said defendant Simon P. Healey. Let a copy of this order be served on the plaintiff personally." The issues in said action have never been brought on for trial or tried. The affidavits upon which the order appealed from was obtained disclose that while the Secretary of the Interior had decided adversely to the rights of the plaintiff, For-

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man, in the contest before the land department, an application for rehearing in his behalf was pending and undisposed of.

Ink & Wallace and *Purcell & Bradley,* for appellant.

Charles E. Wolfe and *E. A. Munger,* for respondent.

COCHRANE, J. (after stating the facts). The appeal in this case is from an interlocutory order in no way affecting its merits upon the issue joined, which has not yet been tried. Plaintiff, in his complaint, bases his cause of action upon his right to possession of the land in question. The injunctional order was procured on showing by affidavit in the action, and, as a provisional remedy only, contains language against plaintiff seldom, if ever, used, except in writs of ejectment, and after full hearing upon the merits, where the right of cross-examination has been secured. Without passing upon the right of plaintiff to the injunctional order granted him in the first instance, it may be noted that there is an averment in the complaint of threatened waste, and of the insolvency of the defendant, from which the inference is deducible that the remedy at law would not, in the event of recovery, fully protect plaintiff's rights, and in the prayer for relief an injunction is expressly asked for. It will also be noted that the answer and counterclaim of defendant contain no averments whatever which, if proven, could, under any rule so far declared by the courts, entitle defendant to the equitable protection of an injunction; and there is no prayer for such a relief in defendant's answer. The provisional remedy by injunction in this state is of statutory origin, and is granted a plaintiff when necessary to protect his rights pending final determination of the case upon the merits. Section 5344, Rev. Codes. And this only when the complaint contains averments which, if proven, would entitle plaintiff to the relief demanded, and its issuance is made to appear as necessary to protect plaintiff's rights during the litigation. *McHenry* v. *Jewett,* 90 N. Y. 58; *Hartt* v. *Harvey,* 32 Barb. 55, 68; *New York, etc., Ry. Co.* v. *Ry. Co.,* 11 Abb. N. C. 386; *Bagaley* v. *Vanderbilt,* 16 Abb. N. C. 359; *Close* v. *Flesher* (Com. Pl.) 28 N. Y. Supp. 737; *Kerr* v. *Dildine,* 6 N. Y. St. Rep. 163; *Roosevelt* v. *Edson,* 51 N. Y. Super. Ct. 287; *Catholicon Hot Springs Co.* v. *Ferguson,* 7 S. D. 508, 64 N. W. Rep. 539. The complaint must pray for injunctional relief. Section 5266, Rev. Codes; *Hulce* v. *Thompson,* 8 How. Prac. 475; *Ward* v. *Dewey,* 7 How. Prac. 17; *Olssen* v. *Smith,* 7 How. Prac. 481; *Hovey* v. *McCrea,* 4 How. Prac. 31; *Locke* v. *Davison,* 111 Ill. 19. Some cases go to the length of declaring that, if the cause for temporary injunction exists at the time of the commencement of the action, the complaint, in its prayer for relief, must contain a request for this relief *pendente lite.* *Walker* v. *Devereaux,* 4 Paige, 229; *Vincent* v. *King,* 13 How. Prac. 239; 10 Enc. Pl. & Pr. 962, and note. The reason for the rule is found in this: that the writ of injunction has here been abolished, and the injunctional order, as a provisional remedy, substituted therefor. Section 5343, Rev. Codes. The order can be awarded only in the cases and in the manner speci-

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fically prescribed, and is impliedly forbidden in any others. *Jackson* v. *Bunnell,* 113 N. Y. 216, 21 N. E. Rep. 79; *Fellows* v. *Heermans,* 13 Abb. Prac. (N. S.) 9; *Erie Ry. Co.* v. *Ramsey,* 45 N. Y. 637. "The injunctional order is temporary in its character. It assumes a pending litigation, in which all the questions are to be settled by a judgment, and operates only until that judgment is rendered. If by that a permanent injunction is granted, the temporary one is, of course, ended; and equally so if a permanent injunction is in the end denied." *Jackson* v. *Bunnell,* 113 N. Y. 216, 21 N. E. Rep. 79. It follows from what we have said that the injunctional order here, although containing language proper, and only properly used, in a permanent injunction, could have been intended, and, at best, could operate, only as a temporary injunction. It also follows that defendant was not entitled to the protection of a temporary injunction because the averments of his counterclaim are insufficient to secure such relief, and the prayer for relief appended thereto is for money damages only. The defects in the pleading cannot be supplied by affidavits used to support the motion for a temporary injunction. *Stull* v. *Westfall,* 25 Hun 1; *Close* v. *Flesher* (Com. Pl.) 28 N. Y. Supp. 737.

The order appealed from was improperly issued for the further reason that the statute gives the right to relief by temporary injunction to a plaintiff in the litigation, only, and not to the defendant. That the plaintiff is entitled to the relief demanded must appear by the complaint, and a part of the relief demanded must consist in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff. Subdivision 1, § 5344, Rev. Codes. "When, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act." "And, when during the pendency of an action it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition." Subdivisions 2, 3, § 5344, Rev. Codes. No right is here given a defendant, as such, even under a counterclaim, to restrain any of the enumerated threatened injuries, if done or threatened by plaintiff. But to secure the redress, a party must begin an independent action, making his adversary a defendant. *California Pacific Ry. Co.* v. *C. P. Ry. Co.,* 47 Cal. 549; 1 Code Civ. Proc. N. Y. § 603, note "b."

Other objections are urged against this order. But one other will be noticed: The closing paragraph of the order from which this appeal was taken is clearly unwarranted, viz.: "It is further ordered that you, Frank N. Forman, the plaintiff, and your agents, servants, and employes, be, and you are hereby, perpetually enjoined and restrained from in any manner interfering with, or hindering or obstructing, the use and occupation of said lands, and every part thereof,

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by the defendant Simon P. Healey. And it is further ordered that you, immediately ofter the service of this order upon you, vacate said premises, and surrender and yield up possession thereof, and every part thereof, to said defendant Simon P. Healey." Plaintiff was in possession of the land, and had his family, house, and home thereon. Whether rightfully or wrongfully there, it was the purpose of the litigation to have determined. The court could not determine this question, and eject plaintiff from his home, on the application for a temporary injunction secured on affidavit. His contest before the Interior Department was pending upon petition for rehearing, and had not been finally determined. A disobedience of this part of the order could not be punished as a contempt, because the making thereof was entirely beyond the court's jurisdiction. *Messler* v. *Simonson,* 10 Mich. 335. Possession of land is not thus to be disturbed by means of a temporary injunction, nor can the rights of the parties be prejudiced in advance of the trial of the main issue. *Dickson* v. *Dows,* 11 N. D. 404, 92 N. W. Rep. 797; *Arnold* v. *Bright,* 41 Mich. 207; *Hemingway* v. *Preston,* Walk. Ch. 528; *People* v. *Simonson,* 10 Mich. 335; *McCombs* v. *Merryhew,* 40 Mich. 728; *La Cassagne* v. *Chapuis,* 12 Sup. Ct. 659, 36 L. Ed. 368. "The principle is at least as old as the Magna Charta that a man shall have a trial of his right before dispossession, and we cannot sanction any departure from it that shall leave every one to the mercy of a special and summary proceeding, on which an inquiry into the facts must always be imperfect, and generally one-sided." *McCombs* v. *Merryhew,* 40 Mich. 725. Upon this subject the Supreme Court of Nebraska, in *Calvert* v. *State,* 52 N. W. Rep. 692, said: "The statement of the case carries with it a full answer. The judge, in effect, has undertaken to dispose of the merits of the case without a hearing. A temporary injunction merely prevents action until a hearing can be had. If it goes further, and divests a party of his possession or rights in the property, it is simply void." And in *Farmers' Ry. Co.* v. *Reno,* 53 Pa. 224, Justice Strong, speaking for the court, used the following language: "The bill itself presents no such case as to justify the decree of the court on motion, even if all its averments were supported by affidavits. * * * It would certainly be a novelty for a court in which an ejectment was pending to issue a writ of estrepement to restrain any use by the defendant of the land in controversy, and still greater would be the novelty if defendants were prohibited from interfering with the plaintiff's enjoyment of the land while the suit was in progress. Yet this is analogous to what was done in this case. The injunction must therefore be dissolved." In *Catholicon Hot Springs Co.* v. *Ferguson,* 7 S. D. 508, 64 N. W. Rep. 539, the following language is used: "We are clearly of the opinion that the court had no authority to grant a preliminary mandatory injunction requiring defendants to surrender the possession of the premises to the plaintiff."

Our conclusion is that the injunctional order from which this appeal was taken, excepting in so far as it vacates the order of May 21, 1901, was erroneous, and without authority of law to sustain it. The order

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appealed from is reversed, excepting in so far as it vacates the injunctional order as to May 21st, and, as to that portion vacating the order of May 21st, it is affirmed. Appellant to recover costs of both courts. All the Judges concur.

(93 N. W. Rep. 866)

CHARLES A. MORTON *et al. vs.* CASS COUNTY.

Appeal from district court, Cass county; *Charles A. Pollock,* J.

Action by Charles A. Morton and others against Cass county and another. Judgment for defendants, and plaintiffs appeal. Reversed.

J. E. Robinson, for appellants.

Newton & Smith and *Morrill & Engerud,* for respondents.

PER CURIAM. The sole question presented in this case turns upon the constitutionality of chapter 161, Laws 1901. The same question is presented and decided at this term in the case of *Angell* v. *Same Defendants,* 91 N. W. Rep. 72, 11 N. D. 265, which decision will control this case. Judgment reversed, and the district court is directed to enter judgment for the relief demanded in the complaint, with costs of both courts.

(91 N. W. Rep. 1126)

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INDEX.

ACCORD AND SATISFACTION.

1. The obligations of a written contract are not extinguished by an oral agreement for accord and satisfaction at a certain date. The accord must be executed by a delivery and reception of the thing agreed to be accepted in satisfaction. Arnett v. Smith, 55.

2. *Held*, that a certain oral agreement, referred to in the opinion, did not amount to an accord and satisfaction, and was without legal effect upon the rights and obligations of the parties as evidenced by the written contract. Arnett v. Smith, 55.

ADVERSE POSSESSION.

1. Section 3491a, Rev. Codes 1899, construed and *held*, that the doctrine of tacking possessions is not applicable. Streeter Jr. Co. v. Fredrickson, 300.

2. *Held*, in an action to quiet title and determine adverse claims under § 3491a, Rev. Codes 1899, it is necessary that taxes shall have been paid on the premises claimed for ten years. Streeter, Jr. Co. v. Fredrickson, 300.

ALTERATION OF INSTRUMENTS.

A written order for a threshing machine was altered to show provision for security, *held*, that the alteration was not a material one, in view of the fact that the defendants had given such security, and received the machine uninfluenced by the contents of the order as changed. Machine Co. v. Ebbighausen, 466.

ANIMALS.

1. The rule by statute in this state, like that of common law, from which it is taken, declares the owner of live stock liable in damages for traspass by such stock on the lands of another. Ely v. Rosholt, 559.

2. When live stock, except hogs, between November 1st and April 1st, range upon the uninclosed lands of another and injure personal property thereon, the owner, or person in charge of such live stock, is not liable for such damage in the absence of proof of willful injury. Ely v. Rosholt, 559.

3. Under § § 1549 and 6153, Rev. Codes, certain live stock is permitted to run at large between November 1st and April 1st each year, and are not permitted to run during the other months except in those counties where the provisions of chapter 42 of the Code of Civil Procedure have been abolished. Ely v. Rosholt, 559.

APPEAL AND ERROR. See JUSTICE OF THE PEACE, 24; MANDAMUS, 1.

1. A motion to affirm a judgment, where trial de novo is demanded, which is upon the sole ground that the statement of the case does not contain all the evidence offered at the trial, will be denied, even though the statement is insufficient to authorize a retrial, when error is properly assigned in appellant's brief upon the judgment roll proper. State v. Heinrich, 31.

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APPEAL AND ERROR—Continued.

2. Where there is a conflict as to execution of a contract and the verdict of the jury is supported by a clear preponderance of the evidence, the verdict will not be disturbed. Talbot v. Boyd, 81.

3. The Supreme Court will, under rule 12 (6 N. D. xviii) affirm the order appealed from where the appellant wholly fails to assign errors in his brief. Wilson v. Kartes, 92.

4. *Held*, construing § 5605, Rev. Codes, that the written notice of the entry of judgment required by said section to set the time for appeal running in order to be available against an appellant must be served upon such appellant by his adversary, and that service by an appellant upon the respondent does not operate to limit appellant's time for appeal. Prescott v. Brooks, 93.

5. Under § 5630, Rev. Codes, the only retrial authorized is upon an appeal from the entire judgment and complete transference of jurisdiction to the Supreme Court. *Held*, that where the appeal is from a portion of the judgment, with a request for the retrial of only a portion of the case, no jurisdiction is conferred on the Supreme Court and the appeal will be dismissed. Prescott v. Brooks, 93.

6. A reference having been consented to, counsel cannot be heard to object thereto for the first time on appeal. Clopton v. Clopton, 212.

7. An application to the district court for a new trial, based upon newly discovered evidence, and also on the ground that the evidence given at the trial is insufficient to justify the verdict is addressed to the sound judicial discretion of the court. Pengilly v. Case Mach. Co., 249.

8. An order granting a new trial will be affirmed in the absence of a showing of an abuse of discretion. Pengilly v. Case Mach. Co., 249.

9. Upon an appeal from an order granting a motion for new trial, which is made upon a statement of the case, the appellant must embody in his abstract such portions of the statement as will establish the errors upon which he relies for a reversal. In case of a failure so to do the order will be affirmed. McMillan v. Conat, 256.

10. In an action for the purchase price an instruction to the jury that a substantial compliance with the contract would entitle the plaintiff to a full recovery, *held* error. *Held*, further, that the instruction was without prejudice, for the reason that the jury found that there was not a substantial compliance. Society v. Hildreth, 262.

11. On the trial an answer was allowed to the following question, duly objected to—"Did the defendant corporation, * * * or anyone of them, pay back to you the $53.24?" *Held* prejudicial error for which a new trial will be granted. Thompson v. Ins. Co., 274.

12. An appeal will be dismissed where it is taken from a part of the judgment only. Crane v. Odegard, 342.

13. *Held*, that where an application is made under § 5298, Rev. Codes, 1899, to set aside a default judgment, it is addressed to the sound judicial discretion of the court, and the order of the trial court will not be disturbed unless it clearly appears that there has been an abuse of discretion. Wheeler v. Castor, 347.

14. *Held*, that orders of the trial court setting aside default judgments are seldom disturbed where the court below directs a new trial on the merits. Wheeler v. Castor, 347.

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APPEAL AND ERROR—Continued.

15. *Held*, that the instructions upon which the case was submitted to the jury were not misleading, or prejudicial to the defendant, and that the motion for a new trial was properly denied by the trial court. State v. Thoemke, 386.

16. *Held*, that the court did not err in denying defendants motion for a new trial. Nokken v. Mfg. Co., 399.

17. In an action to recover damages caused by the alleged negligence of the defendant, *held*, that the court did not err in submitting the question of the defendant's negligence to the jury. Nokken v. Mfg. Co., 399.

18. The granting or refusal of a preliminary injunction, as well as the dissolution of the same, rests in the sound judicial discretion of the trial court, which will not be reversed or controlled except for error or abuse. Dickson v. Dows, 404.

19. *Held*, that the order of the trial court dissolving a temporary injunction was properly made, and is affirmed. Dickson v. Dows, 404.

20. In an action for the foreclosure of a contract for the sale of land, where the complaint in intervention does not show that the intervener would either lose or gain as a result of a judgment in the action, the district court erred in refusing to strike out its ex-parte order permitting the intervention. Dickson v. Dows, 407.

21. *Held*, that error cannot be predicated on a ruling sustaining an objection to a question when the answer called for is thereafter fully given by the witness. Bank v. Monson, 423.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

In an action to compel the assignee, after a full accounting and discharge, to account anew, *Held*, that the complaint fails to state a cause of action. Freeman v. Wood, 1.

ATTACHMENT.

1. In an action brought to recover damages for alleged breach of contract, an attachment levied on property of the defendant, a non-resident, brought into this state for lawful purpose, will be set aside. Woodhull v. Trust Co., 157.

2. Where a receiver has obtained rightful possession of personal property within the jurisdiction of his appointment, he will not be deprived of its possession, when in the performance of his duty, he brings the property into this state. Woodhull v. Trust Co., 157.

3. If the property is seized by a creditor prior to the appointment of the receiver, or before his taking possession in the state of his appointment, attachment will lie. Woodhull v. Trust Co., 157.

ATTORNEYS. See District and Prosecuting Attorneys.

1. *Held*, upon the facts stated, that in procuring the judgment to be entered the accused was guilty of deceit whereby the court was misled and fraudulently induced to enter a judgment which it did not desire and had not directed to be entered. In re Freerks, 120.

2. *Held*, that a fraudulent use was made of a false and fraudulent judgment by an attorney. In re Freerks, 120.

3. *Held*, that in committing the fraud stated the attorney was guilty of such unprofessional conduct as would warrant suspension from practice or disbarment under § 428, Rev. Codes. In re Freerks, 120.

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ATTORNEYS—Continued.

4. Under extenuating circumstances stated in the opinion attorney was suspended, to be conditionally reinstated upon terms stated. In re Freerks, 120.

5. *Held*, that while supreme court has authority to discipline attorneys, as a general rule disbarment proceedings should be initiated in the district court. In re Freerks, 120.

6. Where an attorney procures his admission to the bar by a gross and inexcusable act of deception practiced upon the court, the order admitting him will be revoked. In re Olmstead, 306.

7. *Held*, upon the showing stated in the opinion, that the applicant should be restored to practice. In re Simpson, 526.

8. A court which has the power to suspend or disbar an attorney also has the power to reinstate. In re Simpson, 526.

9. Upon application for reinstatement, the mere formal proof of good moral character required for admission is not enough; the proof must be of a satisfactory character, and of sufficient weight to overcome the former adverse judgment. In re Simpson, 526.

10. It is the duty of attorneys to maintain the respect due courts of law, and to refrain from offensive language, either towards the court, counsel or witnesses. In re Voss, 540.

ATTORNEY AND CLIENT. See Principal and Agent, 1.

ATTORNEY GENERAL. See Courts, 2, 4; Quo Warranto, 3.

AUSTRALIAN BALLOT. See Elections, 12.

BANKS AND BANKING.

A cashier's check is not subject to countermand like an ordinary check. The relations of the parties are analogous to those in connection with a promissory note. Drinkall v. Bank, 10.

BICYCLES. See Municipal Corporations, 1-4.

BILLS AND NOTES.

1. The title of an endorsee of a negotiable note is defective when the consideration is unlawful, or the indorsement is procured by unlawful means. Drinkall v. Bank, 10.

2. Payment, to effect a discharge, must be made to the rightful holder, or his agent; but possession of a negotiable instrument indorsed in blank by the payee is prima facie evidence of holder's right to payment, and payment to such a holder, made in good faith and in ignorance of defects in his title, will discharge the instrument. Drinkall v. Bank, 10.

3. *Held*, that the endorsement and delivery of a cashier's check by payee to a gambler in payment of chips to be used for gambling does not make the gambler a holder in due course, and his title thereto is defective. Drinkall v. Bank, 10.

4. *Held*, there is substantial evidence to sustain the finding of the jury that defendant maker of check had notice of defects in indorsee's title prior to making payment. Drinkall v. Bank, 10.

BROKERS.

Held, that a written instrument which authorized real estate brokers to sell "the following described property," conferred only ordinary authority, and did not authorize them to sign defendant's name to the contract of sale. Brandrup v. Britten, 376.

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CERTIORARI. See District Attorneys, 3; Taxation, 4.

Application for writ for the purpose of annulling a tax and defeating its collection denied upon the sole ground that plaintiff had mistaken his remedy and was not in proper forum. Duluth Elevator v. White, 534.

CONSTITUTIONAL LAW. See Drains, 8.

1. Sections 2440, 2441, Rev. Codes, authorizing district courts to exclude territory from the corporate limits of cities in certain cases, are unconstitutional, for the reason that they vest legislative powers in the courts. Glaspell v. Jamestown, 86.

2. The various parts of the law (c. 161, Laws 1901) are so interdependent that the constitutional parts cannot be divorced from those which are unconstitutional, hence the whole law is void. Angell v. Cass Co., 265.

3. Courts will not inquire into and determine the constitutionality of statutory provisions at the instance of persons who are not interested or affected by such provisions. Turnquist v. Commissioners, 514; Ely v. Rosholt, 559.

CONTRACTS. See Evidence, 1; Landlord and Tenant, 2; Partnership; Sales; Specific Performance; Vendor and Purchaser.

A written contract for the purchase and sale of real estate may be annulled and extinguished by parol. Mahon v. Leech, 181.

CONVERSION.

A contract for the sale of real estate, which is valid and enforceable in equity, operates as a conversion. The vendor's interest thereafter in equity is in the unpaid purchase price, and is treated as personalty; the vendee's interest is in the land, and is realty. Clapp v. Tower, 556.

COSTS.

1. Appellants, although successful, are not entitled to recover for printing unnecessary and useless matter in their abstract. State v. Heinrich, 31.

2. In an action for the condemnation of property by a city, where a judgment in favor of the city is set aside on its own motion upon the ground of its inadvertance or mistake, it is error to impose costs on the defendants as terms. City of Fargo v. Keeney, 484.

COURTS. See Attorneys, 5, 8; Reference.

1. The district court is adequate to afford full relief in tax cases. Duluth Elevator Co. v. White, 534.

2. Upon an application for a prerogative writ the supreme court will judge for itself whether the matter demands the interposition of that court, and leave to issue the prerogative writ should in such cases be applied for by the attorney general. Duluth Elevator Co. v. White, 534.

3. The fact that a contemplated election will be merely irregular, and will not be absolutely illegal and void, will not suffice to invoke the original jurisdiction of the supreme court. State v. Wilcox, 329.

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COURTS—Continued.

4. Where the supreme court will take original jurisdiction, leave to file an information should be applied for by the attorney general. State v. Wilcox, 329.

5. *Held*, that the jurisdiction of the supreme court is primarily appellate, and that when the original jurisdiction of the court is invoked, under § 87 of the constitution, the prerogative powers of the court will only be put forth in defense of the state, its franchises, and the liberties of the people. State v. McLean Co., 356.

CRIMINAL LAW. See JUSTICE OF THE PEACE, 1.

1. Upon an issue of insanity a layman may be required to express an opinion as a witness, but before doing so the facts developed must show his competency to testify. State v. Barry, 428.

2. *Held*, that no inflexible rule has been formulated which will exactly measure the amount of testimony required to show competency to give opinion evidence. State v. Barry, 428.

3. *Held*, after quoting from the charge to the jury, that the language quoted gives clear expression to the views of the presiding judge upon the weight and effect of the evidence offered in behalf of the state, and hence the same is prejudicial error. State v. Barry, 428.

4. *Held*, construing § § 8176, 8217, Rev. Codes, that the common law rule permitting trial courts to give expression to their views on the credibility of testimony, or its weight or effect, has been abrogated by statute in this state. State v. Barry, 428.

5. *Held*, that where the court in certain portions of the charge has given expression to its views as to the weight and effect of the evidence, the error is not cured by instructing the jury in other portions of the charge that they were the sole judges of the weight and effect of such evidence. State v. Barry, 428.

6. The jury has the right to disbelieve and wholly reject the testimony of any witness, whether he is contradicted or not; and when this is done wrongfully the court is powerless, in a criminal case, to set aside a verdict of acquittal. State v. Barry, 428.

7. A proper request for instructions was delivered to the trial court after the charge had been read to the jury, but before the jury had retired for deliberation. *Held*, that it was error to refuse the request upon the ground that it was presented too late. State v. Barry, 428.

8. *Held*, that the defense of insanity is a legal defense, and hence it should not be disparaged, or placed under the ban of disapproval by the court. State v. Barry, 428.

DAMAGES. See PRACTICE; EXCHANGE OF PROPERTY.

1. A landlord who retains possession and control of portions of a tenement building is liable to tenants of other portions for damages growing out of the careless management of the portions so retained. Kneeland v. Beare, 233.

2. In an action to recover damages caused by a single act of negligence, it is not necessary to allege in the complaint the separate items of damage resulting therefrom. Nokken v. Mfg. Co., 399.

DEPOSITIONS.

1. Under § 5682, Rev. Codes, a party to an action may read in evidence a deposition taken by his adversary, but his right to introduce the deposition does not extend to introducing mere exerpts or isolated parts thereof at his option. Bank v. Elevator Co., 280.

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DEPOSITIONS—Continued.

2. *Held*, that an exception to a deposition is insufficient when it fails to specify wherein and in what particular the deposition was not taken in proper time. Ueland v. Dealy, 529.

3. Where the true ground of the exception to a deposition is not specified and filed with the clerk, *held*, that the exception was insufficient, under § 5687, Rev. Codes, 1899. Ueland v. Dealy, 529.

4. *Held*, that an exception to a deposition, made on strictly technical grounds, should not be sustained. Ueland v. Dealy, 529.

DISBARMENT. See Attorneys; District and Prosecuting Attorneys.

DISTRICT AND PROSECUTING ATTORNEYS. See Attorneys.

1. *Held*, upon a conceded state of facts, that the order of the district court requiring the county to deduct $100 from the salary of the state's attorney was without authority of law, and null and void. State v. Lauder, 136.

2. *Held*, that a refusal to prosecute, or willful misconduct in office, the state's attorney being present in court and able to perform his official duty, will not justify an order deducting from such officer's salary the compensation of a substitute. State v. Lauder, 136.

3. An order depleting the salary of the state's attorney not being appealable, and the law not affording in regular course a remedy which is plain, speedy and adequate, the writ of certiorari is the proper remedy to bring up such order for review. State v. Lauder, 136.

4. A state's attorney who renders professional assistance to a defendant in a criminal action violates his duties as state's attorney and his duties as an attorney at law. In re Voss, 540.

5. A state's attorney who on several occasions gambles for money in a public gambling house and wilfully refrains from informing against the keeper thereof, is guilty of a misdemeanor involving moral turpitude, and violates his oath and the express commands of § 7243, Rev. Codes 1899. In re Voss, 540.

6. A state's attorney who neglects to prosecute offenders against the prohibition law, when the proofs of such violations are furnished him, is, under § 7620, Rev. Codes, guilty of a misdemeanor, authorizing disbarment or suspension. In re Voss, 540.

7. A state's attorney is not excused from performing his official duties as state's attorney because local sentiment favors the nonenforcement of laws which have been violated, nor is he excused from in good faith attempting to perform such duties because convictions are difficult to obtain. In re Voss, 540.

DIVORCE. See Evidence, 4-7; Reference.

DRAINS. See School Lands.

1. *Held*, that, the board having acquired jurisdiction to construct the drains, and due notice of the hearing of the review of the assessments having been given, there being no allegation of fraud, the determination of the board upon the assessment of benefits is conclusive. Turnquist v. Commissioners, 514.

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DRAINS—Continued.

2. The authority of the board of drain commissioners is joint, and, under § 5146, Rev. Codes, a majority of such board are competent to act. *Held*, that the fact that a part of the proceedings relating to such drains were taken by only two members of the board does not affect their validity. Turnquist v. Commissioners, 514.

3. Landowners who are assessed for benefits under the Drainage Law are not deprived of their property without due process of law by the issuance of interest-bearing bonds to defray the cost of construction of drains, and the postponement of their assessments and divisions thereof into as many parts as the bonds have years to run, under § 1474, Rev. Codes. Erickson v. Cass Co., 494.

4. In an action to enjoin the collection of drainage assessments, *held*, that the board of drainage commissioners complied with the requirements of § 1454, Rev. Codes, as to the publication and posting of notices of hearing upon assessments, and that the notices were in the proper form; further that the establishment and construction of the drain were not invalid by reason of alleged defects in the right of way deeds. Erickson v. Cass Co., 494.

5. The board of drain commissioners being empowered by statute to determine benefits and assess the costs of drains, their determination, in the absence of the allegation and proof of fraud, is not open to collateral attack, and is conclusive.

Where jurisdiction is conferred on the board by the filing of a sufficient petition, and the giving of proper notice, courts will not inquire into the correctness of their determination upon questions within their jurisdiction. Erickson v. Cass Co., 494.

6. Under § 1456, Rev. Codes, expenses for office rent, books, printing, attorneys' fees, etc., are proper to be included in the cost of the construction of the drain. Erickson v. Cass Co., 494.

7. *Held*, that the assessments authorized by § 1452, Rev. Codes, are for benefits which are special to the land assessed, and are not what are commonly termed "Conjectural" or "Speculative" benefits. Erickson v. Cass Co., 494.

8. A court of equity will not by injunction prevent the collection of assessments for benefits imposed to pay the cost of constructing drains, when the parties seeking such relief have been actively or impliedly consenting parties to such construction, and to the proceedings which led to the assessments, whether such assessments are legal or not, nor will such persons be heard to question the constitutionality of the law under which such drains are constructed. Erickson v. Cass Co., 494.

9. *Held*, on the facts detailed in the opinion, that plaintiffs are estopped from asserting the invalidity of the assessments upon their lands to defray the cost of constructing certain drains. Erickson v. Cass. Co., 494.

EJECTMENT.

1. *Held*, that a mortgagor, who is the owner of the land, can maintain an action to eject a mortgagee who takes possession of the land under a foreclosure by advertisement which was illegal and wholly void, and do so without paying the mortgage debt. McClory v. Ricks, 38.

2. Evidence offered which was pertinent to the defense of title as alleged by one defendant, and which was not in terms offered for any particular purpose, *held*, that such evidence could not be resorted to by the defense to sustain an equitable right of possession not pleaded in the answer. McClory v. Ricks, 38.

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ELECTIONS.

1. The purpose of the Australian ballot is to secure a secret ballot to electors, to the end that they may express their choice of candidates uninfluenced by thretts, intimidation, or corrupt motives. Perry v. Hackney, 148.

2. The provisions of the statute governing elections will be held mandatory when the purpose of the legislature would be defeated if its command to do acts in a particular way did not imply an inhibition to do them in any other. Perry v. Hackney, 148.

3. *Held*, that the requirements of § 521, Rev. Codes, are but means to secure the purpose of the law, viz., a secret ballot, and that a violation of the same does not of necessity destroy the secrecy of the ballot. Perry v. Hackney, 148.

4. Where the ballots were marked in secret, and the voters were qualified electors, the election being free from fraud, it is *held* that the court did not err in refusing to throw out the precinct because of the failure of the precinct officers to comply strictly with the statute, inasmuch as such irregularities did not defeat the purpose of the requirement, or in any way affect the result of the election. Perry v. Hackney, 148.

5. Where an election, if held, will be irregular, but not illegal and void, the holding thereof will not be enjoined. State v. Wilcox 329.

6. In determining which of two sets of nominees of a split polical convention is entitled to have their names placed on the official ballot as the party nominees, the inquiry of the court should be limited to ascertaining which of the conventions is the regular one. State v. Porter, 309.

7. Delegates who are present and entitled to vote, cannot by refraining from doing so, invalidate the action taken by a majority of those who do vote. State v. Porter, 309.

8. A political convention is the judge of the qualifications of its members, and its determination of contests is conclusive. State v. Porter, 309; State v. Liudahl, 320.

9. The voluntary withdrawal of delegates from a political convention which has been regularly organized does not deprive those who remain of the power to act, or destroy the identity of the convention. State v. Porter, 309.

10. A minority of the lawful delegates of a political convention cannot withdraw from the regular convention and unite themselves with persons whose credentials have been rejected by the convention, and successfully claim that they constitute the legal party convention. State v. Porter, 309.

11. A county convention cannot be the regular party organization for one purpose, and irregular for another purpose within its scope to act upon. State v. Liudahl, 320.

12. The provisions of the Australian ballot law do not give a nominee of a county convention, not recognized as regular by the state convention, the right to appeal to the courts for relief. State v. Liudahl, 320.

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EMINENT DOMAIN.

1. *Held*, that the plaintiff is the owner of the fee in the street to the center thereof, except as conveyed to the public for street purposes. Donovan v. Allert, 289.

2. That the use of the street for telephone poles is not a street use, proper, and is a new burden or servitude thereon, inconsistent with the use of the street for travel, and for which compensation must be made. Donovan v. Allert, 289.

ESTOPPEL. See Drains, 9.

Held, on the facts stated in the opinion, that the plaintiff is estopped from alleging the invalidity of the proceedings of the drainage board in a court of equity for the purposes of enjoining the collection of assessments. Turnquist v. Commissioners, 514.

EVIDENCE. See Criminal Law, 1, 2; Judicial Notice; Practice; Fraudulent Conveyances.

1. When the obligations of a written contract are expressed in unambiguous language, it is not competent to vary them by parol evidence of custom or usage. Deacon v. Mattison, 190.

2. A judgment cannot be proven by introducing in evidence the executions issued thereunder, nor by the judgment docket containing an abstract of such judgment, nor by parol, in the absence of a showing that will allow the offer of secondary evidence. Amundson v. Wilson, 193.

3. On the trial the court permitted the plaintiff, under objection, to answer the question, "Did you ever, Mr. Witte, intend to part with the goods except as they were paid for with cash?" *Held* prejudicial error. Mfg. Co. v. Reilly, 203.

4. Where, in an action for divorce, the marriage of the parties is alleged in the complaint, admitted in the answer and is testified to by the plaintiff, *held*, construing § 2757, Rev. Codes, that such testimony does not require corroberation. Clopton v. Clopton, 212.

5. Evidence examined, and *held*, that testimony as to residence is sufficently corroborated. Clopton v. Clopton, 212.

6. In an action for divorce the corroborating testimony of a physician who treated the plantiff for bodily ailments which plaintiff stated to his physician were caused by his domestic troubles, is *held* competent under an exception to the rule excluding hearsay evidence within the meaning of § 2757, Rev. Codes. Clopton v. Clopton, 212.

7. Where, in an action for divorce, the element of collusion is excluded, *held* that only such corroboration as will satisfy the statute is required. Clopton v. Clopton, 212.

8. One who relies upon a lost deed to sustain his title to real estate must establish its original existence, its loss, and the material parts thereof by clear and convincing evidence. Garland v. Bank, 374.

9. In cases where evidence of good character or reputation of the defendant is admissible in his behalf, *held*, that it was not error to strike out the testimony of two witnesses who testified to the dedefendants reputation, but not to his general reputation, and who disclosed upon cross-examination that they had no knowledge of his general reputation. State v. Thoemke, 386.

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EVIDENCE—Continued.

10. *Held*, under the evidence, that a deed, when delivered, was intended to operate as a deed absolute, and that the evidence to show a parol defeasance falls short of the high degree of proof required in such cases. Little v. Braun, 410.

11. In an action on a promissory note, the issue being whether the note was given for a valuable consideration or as an accommodation, certain evidence was *held* to be properly excluded, as it called for a conclusion, and not for a fact. Bank v. Monson, 423.

12. Evidence is considered, and *held* that the verdict was sustained be competent evidence. Bank v. Monson, 423.

EXCHANGE OF PROPERTY.

1. Where the contract is for the exchange of an equal number of bushels of wheat *held* that the measure of damages for the breach of such contract would be the difference between the value of the seed wheat at the time and place it was to be delivered and the market value of the more valuable wheat at the time of the refusal of the defendant to accept the tickets for the same. Talbot v. Boyd, 81.

2. *Held*, that under § 3997, Rev. Codes, the provisions of § 3958, Id., apply to contracts for the exchange of property, where the value of the property to be exchanged by either party is $50 or more; also that damages are measured and determined by § 4985, Rev. Codes. Talbot v. Boyd, 81.

EXECUTORS AND ADMINISTRATORS.

Upon the death of the vendor, in a contract for the sale of land, his interest passes as personalty, and continues as such for the purposes of administration; and, where the executors have canceled the contract for default of the purchases, and thus regained title, they may sell and convey such real estate, and account to the court of their appointment for the proceeds as personalty, and the title so conveyed is good as against the heirs of the descendent claiming title by succession. Clapp v. Tower, 556.

FRAUDS, STATUTE OF.

In order for a real estate broker to sign his principal's name to a contract for the sale of land, under § § 3887, 3690, Rev. Codes, it is necessary that his authority appear in a writing signed by the principal. Brandrup v. Britten, 376.

FRAUDULENT CONVEYANCES.

1. In actions to set aside conveyances as fraudulent as against a creditor claiming under a judgment, proof of such judgment is requisite to maintain such action. Amundson v. Wilson, 193.

2. In an action to set aside a conveyance by a judgment creditor, the fact that the judgment was rendered in an action before the same court and judge is not, of itself, ground for dispensing with the proof of said judgment. Amundson v. Wilson, 193.

3 So long as property retains its homestead character, an incumbrance or alienation of the same does not constitute a fraud upon the judgment creditors of the holder of title. Dalrymple v. Security Improvement Co., 65.

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GAMBLING.

The rule that courts will leave parties to prohibited transactions where their unlawful acts have placed them, *held* not to authorize an indorsee to rely on an indorsement procured in a gambling transaction, nor to prevent the payee from enforcing payment against the maker. Drinkall v. Bank, 10.

GUARANTY.

1. Construing § 4630, Rev. Codes, *held*, that the test as to whether a guaranty amounts to an absolute guaranty, or merely as an offer of guaranty, is whether there has been or has not been that mutual assent or meeting of minds necessary to the existence of a contract. Sewing Mach. Co. v. Church, 420.
2. *Held*, that the instrument sued upon was only an offer of guaranty, and that, inasmuch as notice of aceptance was not given to the defendants, they are not liable thereon. Sewing Mach. Co. v. Church, 420.

HOMESTEAD. See Fraudulent Conveyances, 3.

Under the laws of this state the statutory homestead is exempt from judgment liens and forced sales, save as to certain debts expressly excepted by statute, so long as the property retains its homestead character, and an incumbrance or alienation of the same does not constitute a fraud upon the judgment creditors of the holder of the title. Dalrymple v. Improvement Co., 65.

INJUNCTION. See Drains, 8.

1. Complaint and evidence considered, and *held* that an injunction will not lie to restrain the collection of personal property tax where plaintiff has an adequate remedy at law. Railway Co. v. Dickey Co., 107.
2. Injunction is a proper remedy to prevent the use of streets until the constitutional provision in regard to compensation has been complied with. Donovan v. Allert, 289.
3. The general rule is that a preliminary injunction will not be granted for the purpose of taking property from the possession of one person and placing it in the possession of another. Dickson v. Dows, 404.
4. A defendant in a civil action is not entitled to the provisional remedy of injunction. This remedy is entirely a creature of statute, and is awarded only to the plaintiff in a proper action. Forman v. Healey, 563.
5. The order appealed from is without legal justification; the defendant in his pleadings alleges no facts entitling him to injunctive relief. Forman v. Healey, 563.
6. To entitle the plaintiff to an injunction restraining the defendant pendente lite, the complaint must state facts entitling the plaintiff to injunctive relief, which must be demanded in the prayer for relief even when the injunctional order is applied for on affidavits, after issue joined, under Subds. 2, 3, § 5344, Rev. Codes. Forman v. Headley, 563.
7. In an action to determine the right to possession, use and occupation of land, an interlocutory order, secured on affidavit, ejecting plaintiff from the land, and restraining his re-entry, is void, as without legal authority, and as determining the merits before trial. Disobedience of such an order cannot be punished as for contempt. Forman v. Healey, 563.

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INSANITY. See Criminal Law, 1-2.

INSTRUCTIONS. See Appeal and Error, 10, 15; Criminal Law; Replevin.

A charge to the jury to the effect that a demand and refusal before suit were essential to any recovery by the plaintiff, *held*, under the evidence, that such instruction was prejudicial error. Thompson v. Thompson, 208.

INSURANCE.

1. *Held*, as to a life insurance policy containing the provision that the same "shall not take effect unless the first premium is actually paid while the insured is in good health," that the company is entitled to interpose such defense without a tender or payment back of the premium. Thompson v. Ins. Co., 274.

2. *Held*, on facts stated, that the rule in equity actions to cancel or annul contracts, that the moving party must return everything of value received pursuant to the contract, is not applicable to the facts in this case. Thompson v. Ins. Co., 274.

3. Receipt and retention of premiums with knowledge of forfeiture or of defenses against an action on the same is ordinarily a waiver of such forfeiture or defense. Thompson v. Ins. Co., 274.

INTERVENTION. See Parties, 1.

INTOXICATING LIQUORS.

Upon an appeal from a conviction under § 7605, Rev. Codes, which is part of the prohibition law, *held*, that the verdict of the jury finding the defendant guilty is supported by the evidence. State v. Thoemke, 386.

JUDGMENT.

1. Judgments become liens upon real estate only to the extent of the interest of the judgment debtor, and when the judgment debtor has the bare legal title, without interest, and the equitable title is in another, the lien, in equity, does not attach. Dalrymple v. Improvement Co., 65.

2. The lien of a judgment entered against the vendor of real estate after a contract of sale, but before the execution and delivery of the deed, is subject to such contract. It may be made effective against any unpaid portions of the purchase price. If the entire puchase price has been paid or is due to another than the vendor, no lien attaches. Dalrymple v. Improvement Co., 65.

3. In judgments which are void for want of jurisdiction the remedy either by motion or by action is not barred by the statutory time limit of one year. Freeman v. Wood, 1.

4. In an action to set aside a judgment, *held*, that complaint did not state facts which sufficiently excused failure to proceed by motion. Freeman v. Wood, 1.

5. Under chapter 63, laws 1901, it is not error to direct the entry of judgment notwithstanding the verdict, when it is established by the evidence, as a matter of law, that the verdict should have been directed. Richmire v. Elevator Co., 453.

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JUDGMENT—Continued.

6. *Held*, that the burden is on the moving party to show diligence in seeking relief, and a failure to do so is fatal to the application. Wheeler v. Castor, 347.

7. Order vacating default judgment *held*, properly made. Wheeler v. Castor, 347.

8. Where, on motion to set aside a default judgment, a valid defense is set out by affidavit, it is discretionary with the trial court to accept such affidavit in lieu of a verified answer. Wheeler v. Castor, 347.

9. In an action to condemn land for street purposes judgment of condemnation was entered; later upon the application of the planitiff the district court vacated the judgment. Defendants appeal. For reasons stated in the opinion the order appealed from is sustained upon the ground that the judgment was entered by the inadvertance and mistake of plaintiff's counsel. City of Fargo v. Keeney, 484.

JUDICIAL NOTICE.

1. Under § 5713d, Rev. Codes, a trial court is not required to take judicial notice of a judgment rendered in the same court without being called upon to do so, nor is the introduction in evidence of the judgment docket of itself tantamount to calling upon the judge to take such judicial notice. Amundson v. Wilson, 193.

2. Courts will take judicial notice of the fact that the state convention is the highest organization of a political party. State v. Liudahl, 320.

JURISDICTION. See Courts, 5.

JUSTICE OF THE PEACE.

1. A justice of the peace is not bound, as a matter of duty, to dismiss a prosecution of a criminal offense on motion of the state's attorney. In re Voss, 540.

2. On appeal from a judgment in justice court the notice may properly be served on the adverse party, instead of the attorney appearing on the trial in justice's court. Richmire v. Elevator Co., 453.

3. In appealing to the district court from the justice court, it is sufficient if a proper notice is served upon the adverse party or his attorneys, together with an undertaking by a sufficient surety, as required by § 6772, Rev. Codes, and that such notice and undertaking, with the proof of service thereof, be subsequently, and within proper time, filed with the clerk of the district court appealed to, and that such undertaking be approved by such clerk before the filing thereof. Eldridge v. Knight, 552.

4. It is not necessary, under § § 6771, 6772, 6776 and 6777, Rev. Codes, that the undertaking on appeal be approved and filed by the clerk of the district court before the same is served upon the appellee, or that proof of the approval be served. Eldridge v. Knight, 552.

LANDLORD AND TENANT. See Sewers, 1.

1. Where portions of a building are let to tenants, the landlord retaining exclusive possession and control of other portions, he is bound to exercise common care and prudence in the management and oversight of the portions retained; and the landlord will be liable for damages caused by his failure to do so. Kneeland v. Beare, 233.

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LANDLORD AND TENANT—Continued.

2. In an action for breach of contract under which defendant occupied and cultivated farm lands owned by the plaintiff, evidence considered and *held* not sufficient to establish breach. Deacon v. Mattison, 190.

3. In an action by the lessor to recover rent the lessee cannot, under § § 4080, 4081, Rev. Codes, counterclaim damages caused by failure to connect the cellar of a dwelling house with a sewer, there being no showing of an express contract to do so. Torreson v. Walla, 481.

MANDAMUS.

1. *Held*, that issuance by a county treasurer of a warrant for an amount less than that named in the mandate would not prevent an appeal. State v. Albright, 22.

2. *Held*, that the answer alleged facts which, taken to be true, would not warrant the issuance of the peremptory writ. State v. Albright, 22.

3. *Held*, that county auditor is vested with discretion, and mandamus will not lie to control such discretion. State v. Albright, 22.

4. *Held*, that where the facts create a well-formed doubt as to the validity of the demand for salary, the auditor has a legal right to refuse to issue the warrant, and the writ of mandamus should not issue to compel him to do so. State v. Albright, 22.

MEASURE OF DAMAGES. See EXCHANGE OF PROPERTY, 2.

MORTGAGES.

1. Where a mortgage, in terms, permits the mortgagee to pay the taxes assessed against the land, and add the amount so paid to his claim, and this has not been done, but before foreclosure the mortgagee obtained two tax deeds of the land and conveyed the alleged title obtained by the tax deeds to the defendant, who obtained a third tax deed while he occupied the land as grantee of the purchaser at the foreclosure sale, *held*, the two first mentioned tax deeds were void and conveyed no title, and that all of said tax deeds were obtaned by a truistee of the land and for that reason cannot be set up as a title hostile to the plaintiff's title. Finlayson v. Peterson, 45.

2. The grantee of a purchaser at a void foreclosure acquires no title to the land. Finlayson v. Peterson, 45.

3. Where the grantee of the purchaser at a void foreclosure takes possession of the land in good faith and peaceably, *held*, that such possession was that of a trustee, and that he could be required to account and to surrended possession to the mortgagor after the net rents and profits had discharged the debt, and all lawful taxes paid by the defendant, with interest. Finlayson v. Peterson, 45.

4. *Held*, the defendant being subrogated to the rights of the mortgagee, and being in possession peaceably and by the express consent of the mortgagor, he could not be ejected from the land until his debt and other just claims for taxes were paid. Finlayson v. Peterson, 45.

5. *Held*, that a defendant who takes possession of the plaintiff's land without his consent, under color of a mortgage foreclosure proceeding by advertisement, which was illegal and wholly void, is unlawfully in possession of the land. McClory v. Ricks, 38.

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MORTGAGES—Continued.

6. In an action for the foreclosure of a mortgage, *held*, evidence insufficient to sustain the claim of payment. Ueland v. Dealy, 529.

7. When the purchaser is in possession under foreclosure of mortgage, during the year of redemption, the mortgagor is not entitled to demand, under § 5549, Rev. Codes, of such purchaser a verified statement of the value of the use and occupation of such premises during such period. Little v. Worner, 382.

8. In case a purchaser in possession fails to give to the mortgagor, on demand, a statement of the value of the use and occupation of the premises, the period for redemption is not thereby extended until the determination of a suit to redeem. Little v. Worner, 382.

9. *Held*, in an action to declare a deed, absolute on its face, to be a mortgage, that the defendant did not, at any time, or in any manner, agree to accept the deed as security for a loan, and that no loan was ever made. Little v. Braun, 410.

MUNICIPAL BONDS. See Drains, 3.

MUNICIPAL CORPORATIONS. See Quo Warranto, 1.

1. A city ordinance which provides that "no person shall place, push, draw or back any wagon, cart or other vehicle on any sidewalk," does not prohibit the riding of bicycles upon the sidewalks. Gagnier v. Fargo, 73.

2. The city would be liable to the plaintiff for injuries received by him when rightfully riding his bicycle on the sidewalk, if he was injured by reason of the fact that such walk was not in a reasonably safe condition for travel by pedestrians. Gagnier v. Fargo, 73.

3. Public travel on the sidewalks of a city includes traveling by persons riding on a bicycle. Gagnier v. Fargo, 73.

4. The duty of the city is fulfilled, so far as bicycle riders are concerned, if the sidewalks are in condition for reasonably safe travel thereon by pedestrians. Gagnier v. Fargo, 73.

5. The owners of abutting property are owners of the fee in the street to the center thereof, except as conveyed to the public for street purposes. Donovan v. Allert, 289.

6. The use of the street for telephone poles is not a street use, proper, but is a new burden or servitude for which compensation must be made. Donovan v. Allert, 289.

7. A franchise from a city council granting the privilege of constructing and maintaining a telephone system in said city, does not and can not authorize the occupancy of said street for such purpose against the consent of the owners of the abutting property, unless compensation is made to them. Donovan v. Allert, 289.

NEGLIGENCE. See Appeal and Error, 17.

PARTIES.

1. The interest in a matter in litigation which will authorize a person to intervene under § 5239, Rev. Codes, must be so direct and immediate that the person seeking to intervene will either lose or gain as the direct result of such judgment. Dickson v. Dows, 407.

2. In an action on a contract for the sale of land by the assignee in which the original grantee is not made a party, there being no demurrer on the ground of defect of parties, *held*, that the objection that the assignor was not a party was waived, and could not thereafter be raised by answer. Ross v. Page, 458.

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PARTNERSHIP.

A partner is not entitled to compensation for services rendered in the regular course of the partnership business, in the absence of an express contract therefor, or of a course of dealing from which it may fairly be implied that such compensation was to be given. Wisner v. Field, 257.

PLEADING. See Appeal and Error, 20; Damages, 2; Injunction, 6.

1. The cause of action alleged in the amended complaint, as well as the relief sought, was, in its general scope, the same as in the first complaint. Defendant moved to strike out the amended complaint upon the ground that the same set out a different cause of action than that pleaded in the first complaint. This motion was denied. *Held*, for reasons stated in the opinion, that such ruling was proper. Finlayson v. Peterson, 45.

2. *Held*, that in addition to a sufficient technical affidavit of merits, the moving party must set out a defense which goes to the merits, and that strict practice requires that such showing of merits should be made by a proposed answer, verified, served and filed with the motion. Wheeler v. Castor, 347.

3. The statute of limitations is not, under modern authority, regarded with disfavor by the courts, but is regarded as a plea of equal merit with other lawful defenses to an action. Wheeler v. Castor, 347.

POLITICAL CONVENTIONS. See Elections, 6-11; Judicial notice, 2.

PRACTICE. See Appeal and Error, 4; Taxation, 2.

1. The sufficiency of the evidence to sustain an item of damage sought to be recovered is not properly raised by a motion to strike out the evidence as to such item, and it is not error to refuse to strike out the evidence when it is competent. Nokken v. Mfg. Co., 399.

2. The test of the sufficiency of the evidence to sustain an item of damage should be presented to the court by a request that the jury be directed to disregard the particular item of damage. Nokken v. Mfg. Co., 399.

PRINCIPAL AND AGENT.

1. *Held*, in an action to quiet title instituted by the plaintiff, who claims under a deed subsequently executed by the principal in person, that a prior deed which appears upon its face to have been executed in her name and for her by her attorney in fact, although not in approved form, is her deed, and operated to transfer the title, and that her subsequent deed conveyed no title. Donovan v. Welch, 113.

2. Under the provisions of § § 3887, 3960, Rev. Codes, it is essential to the validity of a written contract for the sale of real property, which is signed by an agent of the vendor, that the authority of such agent to execute it shall be in writing subscribed by the principal. Brandrup v. Britten, 376.

3. *Held*, under the evidence that W. did not act as the agent of the defendant, nor did he, as such agent, agree to any loan to the plaintiff, nor did he ever agree, in behalf of the defendant, that the deed should operate as a mortgage. Little v. Braun, 410.

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PRINCIPAL AND SURETY.

In an action on a bond from which the name of one of the sureties was erased after the same had been signed by some and before the signature by other sureties, *held*,

(a) That the signers whose names precede that which was erased signed without reference to such signature, and are therefore liable.

(b) The surety who signed after the signature which was erased, but before such erasure, not having consented to such erasure, is not bound as a surety.

(c) That the sureties who signed after such erasure, and with knowledge thereof, are estopped from claiming prejudice by reason of such erasure.

(d) The erasure was such a patent fact as to put the commissioners on inquiry as to the circumstances connected therewith, hence it must be presumed that the bond was approved with the knowledge of the release of the surety whose name was erased. Cass County v. Bank, 238.

PUBLIC LANDS.

Where a son, under an oral contract with his mother, makes a timber culture entry on the condition that the mother is to pay all expenses and receive a conveyance of land after final proof, *held* illegal, and the title obtained from the government being indefeasible, except as against the government, the same descended to the heirs of the entryman. Fleischer v. Fleischer, 221.

QUIETING TITLE. See ADVERSE POSSESSION.

Held, that the evidence fully sustains the findings of the trial court in an action quieting the title to real property. Garland v. Bank, 374.

QUO WARRANTO.

1. *Held*, that where municipal corporations have been guilty of usurping franchises by extending corporate authority beyond their lawful boundaries, quo warranto is a proper remedy. State v. McLean Co., 356.
2. *Held*, that the remedy by quo warranto in the supreme court is not a matter of strict right, but rests in the sound discretion of the court, and ordinarily the remedy will be withheld unless sought for by the attorney general. State v. McLean Co., 356.
3. *Held*, under Const., § 103, and Rev. Codes 1899, § 5741, that district courts have jurisdiction by quo warranto where municipal corporations have usurped franchises. State v. McLean Co., 356.

RECEIVERS. See ATTACHMENT, 2.

REFERENCE.

In an action for divorce, after issue joined, the authority of the district court to require a referee to take and report the evidence, either with or without findings is inherent. Clopton v. Clopton, 212.

REPLEVIN.

When, in an action for the recovery of possession of personal property, the defendant contests on the ground of a superior right of possession in himself, the issue of a demand and refusal before bringing suit is eliminated as an issue for the jury, and a charge to the jury that such demand and refusal were essential to any recovery by the plaintiff, was *held* to be prejudicial error. Thompson v. Thompson, 208.

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SALES.

1. In an action against a creditor of the vendee, who had seized the property sold, plaintiff put in evidence the written contract, together with oral testimony tending to show that the terms of the writing had not been complied with, nor the property paid for. Defendant offered no testimony, but moved for a directed verdict on the ground that plaintiff had not made a prima facie case under § 4732, Rev. Codes. *Held*, that the order directing such verdict was error. Thompson v. Armstrong, 198.

2. On a contract, for the sale of personal property, which provides that payment shall be made in "cash when the goods are delivered," the provisions may be waived by the acts or conduct of the seller. Manufacturing Co. v. Reilly, 203.

3. An unconditional delivery of property to a carrier under a contract of sale for cash on delivery, is a delivery thereof to the purchaser. Manufacturing Co. v. Reilly, 203.

4. Whether there has been a waiver of the conditions of a contract by an apparently unconditional delivery is a question of fact, to be determined from such delivery and all other facts in the case. Manufacturing Co. v. Reilly, 203.

5. One who contracts to purchase property is under no legal obligation to accept other or different property. Society v. Hildreth, 262.

6. A purchaser who accepts and retains property different from that bargained for, affirms the contract. Society v. Hildreth, 262.

7. In an action for a failure to deliver personal property under a contract for the exchange of property, the damages are to be measured and determined under § 4985, Rev. Codes. Talbot v. Boyd, 81.

8. The plaintiff, a dealer in cut stone, sues for a balance claimed to be due on an alleged sale of stone curbing. Defendant denied the sale and alleges that his contract was one of employment merely; *held*, that the evidence sustains the contention of the defendant. Ulmer v. McDonnell, 391.

9. The order for a machine provided that, in case the machine failed to work well, the company should be notified at the home office. The agent from whom the machine was bought was notified, but the notice to the company required by the order was not given, *held*, that such general agent's acts, independent of any orders or communication from the company, was not a waiver of the terms of the order. Machine Co. v. Ebbighausen, 466.

SCHOOLS AND SCHOOL DISTRICTS.

1. *Held*, that the appropriation required by § 652, Rev. Codes 1899, is not for the personal benefit of county superintendents, but to create a fund for the payment of clerks lawfully employed in that office. State v. Heinrich, 31.

2. *Held*, that county superintendents are not custodians of that fund, nor are they authorized to audit the accounts of clerks to be paid therefrom. Such accounts are to be audited and paid as other accounts, the amounts of which are not fixed by law. State v. Heinrich, 31.

SCHOOL LANDS.

Lands granted by the United States to the state for school purposes are held in trust, and are not subject to taxation or assessment for benefits arising from the construction of drains. Erickson v. Cass Co., 494.

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SEWERS.

1. The absence of a sewer to connect with the cellar of a dwelling house, in consequence of which water ran into the cellar, not shown in the case to render the house not fit for occupation by human beings. Torreson v. Walla, 481.

2. The putting in of a sewer connection does not come within the meaning of the word "repairs," "delapidation," or "deterioration," but pertains more to an addition or improvement of an original character. Torreson v. Walla, 481.

SPECIFIC PERFORMANCE.

1. The defendant seeks to compel the plaintiff to specifically perform the covenants of a written contract wherein the plaintiff agreed to purchase and the defendant to sell and convey certain real estate owned by the latter. *Held*, on the facts stated in the opinion, that there was no rescission of the contract; also, that the defendant, who had fully complied with his covenants, was entitled to a decree of specific performance. Arnett v. Smith, 55.

2. A court of equity will not extend the relief afforded by specific performance to a purchaser of real estate who has been grossly negligent of his rights or has abandoned his contract. Mahon v. Leech, 181.

3. Where the evidence establishes that the rights of the purchasers under a contract for the sale of real estate, were voluntarily and unconditionally relinquished and abandoned, the court properly refused to decree specific performance. Mahon v. Leech, 181.

STATUTES.

1. Chapter 161, Laws 1901, construed and *held* unconstitutional. Angell v. Cass Co., 265.

2. Where the subject of a statute is single, and the same is expressed in its title, the act will not be invalidated by the fact that the title announces a plurality of subjects. Eaton v. Guarantee Co., 79.

3. Laws 1901, chapter 5, *held* to be constitutional under § 61 of the state constitution. Eaton v. Guarantee Co., 79.

4. The legislature may properly classify subjects for purposes of methodical legislation, but all the objects of the law, situated in like conditions and circumstances, must be embraced within the purview of the law; otherwise the law becomes obnoxious as special legislation. Angell v. Cass Co., 265.

5. When a particular section of a statute is amended by retaining some of the provisions of the original section without change, and complete in themselves, and omitting other provisions which in no way affect the parts retained, and there is no express repeal of the section, the provisions which are retained will not be deemed to have been repealed and re-enacted, but to have been continued in force from their first enactment, with such modifications as have been made by subsequent acts; and the omitted portions only will be deemed to be abrogated and repealed. City of Fargo v. Ross, 369.

6. Construing chapter 149, Laws 1901, *held*, that the amendatory act only repeals that part of § 2496, Rev. Codes, which authorizes county treasurers to retain a commission, and that the remaining portions of said section were in no way affected. City of Fargo v. Ross, 369.

7. *Held*, that the said amendatory act did not, by implication, repeal § 1260, Rev. Codes 1899. City of Fargo v. Ross, 369.

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STATUTES—Continued.

8. Chap. 25, Laws 1901, is unconstitutional and void, for the reason that the subject of the act is not expressed in its title. Turnquist v. Commissioners, 514.

9. Sections 1444 to 1474 inclusive, Rev. Codes 1899, known as the "Drainage Law," inasmuch as a hearing for landowners is provided for upon notice before assessments for benefits become final, is not vulnerable to the objection that it deprives owners of their property without due process of law. Erickson v. Cass Co., 494.

10. Chapter 79, Laws 1899, which amends section 1466, Rev. Codes, relative to the establishment of drans. does not violate § 61 of the state constitution. It is not necessary that the propositions embodied in the amendment shall relate directly to the particular provisions contained in the section amended. It is sufficient if the subject-matter of the amendment is germane to the subject of the act amended and is within the title of the original act. Erickson v. Cass Co., 494.

11. Chapter 25, Laws 1901, *held* to be unconstitutional under § 61 of the state constitution, the real subject of the act not being expressed in the title. Erickson v. Cass Co., 494.

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STATUTE OF LIMITATIONS. See Pleading, 3.

STREETS. See Municipal Corporations, 5-7; Injunction, 2; Eminent Domain.

SUCCESSION. See Executors and Administrators.

TAXATION. See Injunction, 1.

1. Personal property not in this state on April 1st, under chapter 126, Laws 1897, is not taxable for the current year. Gaar, Scott & Co. v. Sorum, 164.

2. In an action for the recovery of money paid under protest for an alleged tax assessed on property brought into the state after April 1st, the court erred in sustaining a general demurrer to the complaint. Gaar, Scott & Co. v. Sorum, 164.

3. A tax levied by the county commissioners on the roadbed, franchise, rails, rolling stock and other property of a railway company within their county, pursuant to the action of the state board of equalization as certified to them by the state auditor under § 179, Cons., *held* to be a tax upon personal property under § 1228, Rev. Codes. Railway Co. v. Dickey Co., 107.

4. Certiorari is not proper remedy for the annulment of taxes. Duluth Elevator Co. v. White, 534.

5. The district court is adequate to afford full relief in tax cases. Duluth Elevator Co. v. White, 534.

TELEPHONES. See Municipal Corporations, 5-7; Eminent Domain, 2.

TRIAL.

When an answer in an action at law presents issues which are cognizable only by a court of equity, proper practice requires that the equitable issues shall be tried and determined by the court before submitting the common-law issues to the jury. Arnett v. Smith, 55.

VENDOR AND PURCHASER.

1. Evidence reviewed in an action on account stated, wherein plaintiff agreed to purchase and defendant to sell real estate, a rescission of the contract being alleged. *Held*, that the contract was not rescinded by the plaintiff, neither was there a mutual rescission. Arnett v. Smith, 55.

2. Where the assignment of a contract to sell land shows on its face that it was made to secure advances, and also contained a provision that authorized the vendor to convey to the assignee when the conditions of the contract were fully complied with, *held*, that the fact that the assignment was given as security is no defense to the vendor, and does not entitle him to refuse to convey. Ross v. Page, 458.

3. In an action by the assignee of a contract to sell land against the vendor for specific performance, *held*, under the evidence narrated in the opinion, and the reasons given therein, that the vendor had waived all violations of the terms of the contract by retaining moneys paid by the assignee to the agents of the vendor under circumstances charging the vendor with notice of the conditions under which it was pad. Ross v. Page, 458.

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VENDOR AND PURCHASER—Continued.

4. Action to recover possession and to quiet title as against the defendants. Evidence examined, and *held*, that the notice of cancellation did not operate to annul the plaintiff's contract of purchase. Buchholz v. Leadbetter, 473.

5. Evidence examined, and *held*, that one of the defendnats bought with knowledge of the prior rights of the plaintiff as purchaser of the land, and hence wrongfully took possession, and holds possession unlawfully as against the plaintiff. Buchholz v. Leadbetter, 473.

WILLS.

1. The intention of a testator is to be ascertained from the language of the will and codicil construed together. If the intention expressed in these instruments is clear, transposition of words will not be resorted to. Adair v. Adair, 175.

2. Will construed, and *held*, that the legacy was not a specific one. Adair v. Adair, 175.

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